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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5709

ROGER SCOTT THOMAS,

PETITIONER

VS.

THE STATE OF ALABAMA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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VS.

THE STATE OF ALABAMA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The petitioner Roger Scott Thomas prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this case on 6 July 1979.

OPINIONS BELOW

The opinion of the Alabama Supreme Court, reported at 373 So2d 1167 (Ala 1979), appears attached hereto in Appendix A. The opinion of the Alabama Court of Criminal Appeals, reported at 373 So2d 1149 (Ala Crim App 1979), appears attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on 6 July 1979. Upon application for extension of time, Hon. Lewis F. Powell, Jr., Associate Justice, granted an extension of time in which to file this petition until 3 December, 1979. Thomas v. Alabama, No. A269 (28 Sept 1979, Powell, J.).

QUESTIONS PRESENTED

1. Alabama's Death Penalty Statute allows a jury to choose only between a finding of guilt with an automatic death sentence and releasing the defendant entirely upon a finding of not guilty.

(a) Where the evidence would have supported a verdict of guilt of a lesser included offense, may a sentence of death be constitutionally imposed?

(b) May the trial court constitutionally refuse to sustain a challenge for cause to a venireman who answers that he would find the accused guilty of capital murder even if he believed that he had not intentionally killed the victim?

2. Alabama's Death Penalty Statute requires that the trial judge consider aggravating circumstances (set out in the statute) in deciding whether to set aside the jury-imposed death penalty.

(a) May the trial court constitutionally consider as an aggravating circumstance a fact which is a necessary ingredient of the capital murder charge, i.e., that petitioner killed while committing a robbery?

(b) May a sentence of death constitutionally be imposed where the only aggravating circumstances were the aforesaid robbery and the fact that the accused was already under a sentence of imprisonment for a felony involving the use of violence to the person?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves Ala.Code §§ 13-11-1 through 9, which is reproduced in Appendix C.

STATEMENT OF THE CASE

The petitioner, Roger Scott Thomas, a black male, age 28, was charged with the intentional killing of William Beville during a robbery on 14 March 1976 (seven days after the death penalty was re-introduced in Alabama).

Petitioner was subsequently arrested in Florida, and gave a recorded statement to an investigator for the district attorney. During that interview, he confessed to the killing and the robbery, but denied that he had intended to kill anyone. This statement was taken without the investigator calling Thomas' attorney. The court overruled a motion to suppress the confession.

During the voir dire of the jury venire, the following exchange took place:

> MR. BOGGS: *** Is there anyone here, although you might believe he robbed him and he did kill him, but you had a question about the intent, is there anyone here that would find him guilty anyway?
>
> VENIRE MEMBER (ROBERT SMITH): I believe I'd probably find him guilty.

(T.44). Smith reaffirmed this position after a question from the judge, stating that he did not know whether he could be impartial. After the district attorney intervened in the questioning and suggested the correct answer, Smith stated that he would find the petitioner not guilty only "if it was a reasonable doubt; a clear reasonable doubt." The defense attorney pointed out to the trial judge that this placed the burden of proof upon the defendant, but the court denied a timely challenge for cause to this juror.

The petitioner's counsel challenged the constitutionality of the Alabama Death Penalty Statute, but was overruled.

The petitioner was tried and found guilty.

The court in the death penalty hearing, or in the trial, heard evidence that the petitioner had been convicted in both Alabama, Florida, and Mississippi. The Alabama

convictions were for robbery and the Florida conviction was a plea bargained sentence of second decree murder.

The trial court found five aggravating circumstances which it held justified leaving the death sentence in effect:

(1) That the petitioner was already under a sentence of imprisonment;

(2) That Thomas had previously been convicted of a crime involving the use or threat of violence;

(3) That Thomas killed the victim while committing a robbery;

(4) That the murder was committed for pecuniary gain;

(5) That the murder was "especially heinous, atrocious, and cruel;" See Appendix B at B-32. The Court of Criminal Appeals specifically rejected the fourth of these circumstances because it would "condemn *** the appellant twice for the same offense," citing Cook v. State, 369 So2d 1251, 1256 (Ala 1978). 1/ The Court also "express[ed] grave doubt as to the applicability of aggravating circumstance five *** to the facts of this case," citing Jacobs v. State, 361 So2d 607, 633 (Ala Crim App 1977), in which the court had defined "especially heinous, atrocious, and cruel" in a way which would exclude its application to the present case. See Appendix B at B19.

The Alabama Supreme Court considered the case on a writ of certiorari and affirmed the conviction.

THE MANNER OF RAISING FEDERAL QUESTIONS

The petitioner's attorney challenged the constitutionality of the death penalty in an oral motion to the

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1/ The original opinion struck aggravating circumstances 3 and 4, but modified this on rehearing. Judge Bookout stated that he would not change the opinion because the "pecuniary gain" was robbery which was alsoan element of the offense.

trial court. On appeal, both courts considered the challenge to the death penalty as foreclosed by their own earlier decisions in Jacobs v. State, 361 So2d 607 (Ala Crim App 1977), aff'd 361 So2d 640 (Ala 1978) and Evans v. State, 361 So2d 654 (Ala Crim App 1977), aff'd 361 So2d 666 (Ala 1978).

REASONS THE WRIT SHOULD BE GRANTED

I.

ALABAMA'S UNIQUE STATUTORY PROHIBITION, WHICH PRECLUDES JURIES IN CAPITAL CASES FROM CONSIDERING FACTUALLY ESTABLISHED LESSER INCLUDED OFFENSES, DEPRIVES ALL PERSONS ACCUSED OF CAPITAL CRIMES OF THE DUE PROCESS AND EQUAL PROTECTION RIGHTS GUARANTEED THEM BY THE FOURTEENTH AMENDMENT AND VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT PROHIBITION OF THE EIGHTH AMENDMENT.

A. Introduction: The Alabama Statute in Perspective 2/

The submission to the jury of lesser included offenses that are supported by the evidence is a commonplace of American criminal jurisprudence. Alabama's criminal law is no exception. As a general principle, Alabama permits a jury to find a criminal defendant guilty of any lesser degree of, or any offense necessarily included in, the crime with which he is charged, Ala. Code § 15-17-1 (1975). This principle is extremely vital in the realm of murder trials. In all non-capital murder trials (and prior to the new Death Penalty Statute, in all murder trials) the trial judge is required to instruct the jury on both first and second degree murder, Ala. Code § 13-1-73 (1975). 3/ The Court is

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2/ This Court has granted certiorari in another case challenging this same aspect of Alabama's law. Beck v. Alabama, 48 USLW 3241 (No. 78-6621, 9 Oct. 1979).

3/ Under Alabama law, first degree murder is "wilful, deliberate, malicious, and premeditated killing." All other common law murder is murder in the second degree. Ala. Code, § 13-1-70 (1975). A person convicted of first degree murder is automatically sentenced to life in prison while a person convicted of second degree murder is sentenced, at the discretion of the jury, to a term of imprisonment of not less than ten years. Ala. Code § 13-1-74 (1975).

required to charge on other lesser degrees of homicide, "if there is any reasonable theory from the evidence which would support the position." Fulgum v. State, 291 Ala 7, 277 So2d 886 (1973). 4/

The Alabama Death Penalty Statute, however, expressly precludes the trial jury from considering lesser included offenses, Ala. Code § 13-11-2(a) (1975). The Alabama legislature apparently drafted and adopted this provision in 1975 because it believed Furman v. Georgia, 408 U.S. 238 (1972), required such a draconian approach. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court pointedly withdrew any foundation for that misguided belief, when it cited the jury's opportunity to return a verdict of conviction for a lesser included offense, even when the evidence would support a capital verdict, as a reason for upholding the Georgia statute. 428 U.S. at 199 n.50 (opinion of Stewart, Powell, and Stevens, JJ.).

B. The Due Process Violation

The due process requirement that a state may not secure a criminal conviction unless it has proven every element of the charged offense beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), is so basic that it is common knowledge among the general populace. Indeed, the centrality of the "beyond a reasonable doubt" standard to criminal jurisprudence in this country was recognized by this Court twice in the last Term. See, Jackson v. Virginia, ___U.S.___, 99 S.Ct. 2781 (1979); Addington v. Texas, ___U.S.___, 99 S.Ct. 1804, 1808 (1979).

4/ In Alabama, the other degrees of homicide are manslaughter in the first and second degrees. Ala. Code § 13-1-90 (1975). Whether a homicide amounts to murder in the first degree, murder in the second degree, manslaughter, or self-defense "is always a question of fact for the jury, under proper instructions of the court." Warren v. State, 197 Ala 313, 319, 72 So 624 (1916).

In preventing juries from returning verdicts on lesser included offenses, the Alabama Death Penalty Statute denigrates the "vital role" played by the standard of proof beyond a reasonable doubt by encouraging juries to convict in spite of it. Concomitantly, the statute reduces the "risk of error" that should be borne by society by placing it squarely on the shoulders of capital defendants.

It takes no more than the most cursory knowledge of human behavior to apprehend the constitutionally precarious dilemma into which a significant number of Alabama capital juries must inevitably be thrust by their statutory inability to return a verdict on a lesser included offense. A jury that possesses a reasonable doubt as to one of the elements of the offense charged, but no doubt as to the defendant's guilt of a lesser offense that does not require proof of the questioned element, is likely, if precluded from convicting of the lesser offense, to resolve its doubts in favor of conviction of the greater.

For example, §§ 13-11-2(a)(2) to (4) make robbery, rape and burglary capital offenses "when the victim [or occupant] is intentionally killed by the defendant," while § 13-1-70 makes [e]very homicide *** committed in the perpetration of *** any *** rape, robbery or burglary *** murder in the first degree," punishable by life imprisonment. The sole element distinguishing the capital from the non-capital crime is, as § 13-11-2(b) makes clear, the defendant's intent to kill. Determining whether this element has been proven beyond a reasonable doubt is, by virtue of its susceptibility to proof only by circumstantial evidence, the most subjective decision a jury must make in a capital trial. It is simply beyond the pale to expect a jury that is firmly convinced a defendant has committed a felony murder, but harbors a significant yet necessarily amorphous doubt about his intent to kill, to give full play to its uncertainty about the defendant's mental state and let him

walk free.

Alabama's experience administering its capital punishment statute confirms that this Court's concern over the intolerable pressure brought to bear on a jury powerless to convict of a lesser offense was not unfounded. Since the effective date of the Alabama statute, prosecutors have attained a 96 percent conviction rate in capital cases where the defendant pleaded not guilty and an 86 percent death sentence rate where the jury rendered a verdict of guilty and the issue of punishment was contested. 5/ These statistics deviate starkly from the expected norm noted by this Court in Woodson v. North Carolina, 428 U.S. 280, 295 n.31 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.) (hereafter "Joint Opinion"):

> Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20 percent of the cases.

Although the wholly alien results achieved under the Alabama statute do not, standing alone, compel the invalidation of the statute, they do highlight the constitutionally unacceptable manner in which the statute must be working and underscore the need to overturn it.

As telling as the raw statistics are, perhaps even more demonstrative of the untenable bind into which the lesser offense preclusion places Alabama capital juries is the reaction of individual jurors forced to confront it. Dissenting in Jacobs v. State, 361 So2d 607, 649, Justice Jones noted the "Hobson's Choice" confronting Alabama juries as dramatized by the voir dire in that case in which a venireman stated that he would hesitate to find a defendant not guilty if he believed him guilty of a lesser included offense. A similar exchange took place in the present case, but the

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5/ These statistics were introduced into evidence at the habeas corpus hearing in John Lewis Evans III v. Alabama, No. 79-2674 (5th Cir) (appeal pending), and are thus quite familiar to the Respondent's attorneys.

trial judge refused to sustain a challenge for cause. The defense was thus forced to use one of its preemptory challenges against this juror. That this has happened twice is certainly indicative of a pervasive feeling among the people.

Such systematic dilution of the standard of proof beyond a reasonable doubt as the Alabama capital statute fosters would be constitutionally infirm with respect to any crime. Where life hangs in the balance it is intolerable; for

> death is a different kind of punishment from any other which may be imposed in this country. *** From the point of view of the defendand, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357358 (1977) (Plurality Opinion). Because of this quantitative and qualitative difference between death and all other punishments,

> there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, 428 U.S. at 305 (Joint Opinion). Accordingly, "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. at 187 (Joint Opinion). Unfortunately, the Alabama legislature has not been similarly sensitive. In barring jury consideration of lesser included offenses, the Alabama death penalty statute fails to meet the needs of the defendant and the community for a verdict "based on reason rather than caprice or emotion;" and it falls woefully short of providing the heightened reliability the Eighth and Fourteenth Amendments require in capital cases.

C. The Equal Protection Violation.

Of all Alabama's criminal defendants, only those charged with a capital offense are denied the protection of a lesser included offense instruction. Consequently, capital defendants must defend not simply their liberty, but their very lives, without an important procedural safeguard afforded every other Alabama defendant -- a safeguard integral to fostering jury faithfulness to the standard of proof beyond a reasonable doubt. The lesser offense preclusion of Alabama's death penalty statute thus infringes upon two rights: the right to life and the right to unprejudiced jury factfinding on the issue of guilt.

Both of these rights are "fundamental"; that is they are "explicitly or implicitly guaranteed by the Constitution." San Antonio School District v. Rodriguez, 411 U.S. 1, 33-4 (1973). The right of all persons to life is explicitly guaranteed in the Fifth and Fourteenth Amendments. The right of an accused to unprejudiced jury factfinding is implicit in the Due Process Clause. In re Winship, 397 U.S. 358 (1970); Keeble v. United States, 412 US 205 (1973).

Because of its discriminatory impact on these fundamental rights, Alabama's capital punishment statute must be strictly scrutinized to determine whether it is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969); see also Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Dunn v. Blumstein, 405 U.S. 330, 338-43 (1972); Lindsey v. Normet, 405 U.S. 56, 73 (1972).

The only interest that Alabama has asserted in support of the statute's preclusion of lesser offense instructions is the need to comply with the Supreme Court's ruling in Furman by controlling undue jury discretion and nullifi-

cation in capital cases. 6/ This objective is insufficient to sustain the law. Gregg and its companion cases squarely held that the concerns Furman expressed for consistent capital sentencing could be satisfied by capital punishment statutes that permit juries to consider lesser included offenses. The death penalty laws of Georgia, Florida, and Texas upheld in those cases clearly demonstrate that there is a "less restrictive means" available to meet Alabama's objective of having a capital sentencing structure that is consistent with the Constitution. See Dunn v. Blumstein, supra, 405 U.S. at 343; Zablocki v. Redhail, supra. Accordingly, Alabama's preclusion of lesser included offense verdicts only in capital cases violates the Equal Protection Clause.

D. The Eighth Amendment Violation.

Gregg and its companion cases establish that under the Eighth Amendment, the constitutionality of the death penalty for murder cannot be evaluated apart from the procedures leading to its imposition. As we have shown, Alabama's practice of barring jury consideration of lesser included offenses in capital cases subverts the factfinding process and undercuts the standard of proof beyond a reasonable doubt. Far from being inconsequential, these deficiencies have resulted in conviction and death sentence rates that are nothing short of astounding.

The uniqueness of Alabama's lesser offense preclusion is perhaps the most eloquent testimony to its unfairness. Other states were no doubt deterred from incorporating a similar provision into their own capital punishment statutes by their anticipation of the likely response of jurors to

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6/ Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama, No. 79-5696 (October Term, 1978), at 24.

it. Both the avoidance by every other state of the lesser offense preclusion and its unpopularity with jurors are highly significant under the Eighth Amendment; for "legislative enactments and jury determinations" are substantial indicia of "contemporary standards regarding the infliction of [capital] punishment." Woodson, 428 U.S. at 288 (Joint Opinion).

In contrast with the overwhelming evidence that Alabama's lesser offense preclusion does not comport with "contemporary standards of decency," Woodson, 428 U.S. 294-5 (Joint Opinion), there is virtually no evidence of societal acceptance of a capital punishment scheme that, like Alabama's, tells juries they must either kill a defendant or set him free. Alabama's statute is thus invalid under the Eighth Amendment.

II.
THE AGGRAVATING CIRCUMSTANCES FOUND PRESENT IN THIS CASE DO NOT CONSTITUTIONALLY ASSURE "RELIABILITY IN THE DETERMINATION THAT DEATH IS THE APPROPRIATE PUNISHMENT."

Woodson and Lockett clearly establish that

> in capital cases * * * the Eighth Amendment * * * requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson, 428 U.S. at 304 (Joint Opinion). It is also clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Gardner, 430 U.S. at 358 (Plurality Opinion). Any capital sentencing procedure, then, must both assure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson, 428 U.S. at 305 (Joint Opinion), and comport with fundamental fairness, Witherspoon v. Illinois, 391 U.S. 510 (1968). Alabama's sentencing process fails on both counts.

Alabama's Death Penalty Statute provides that "robbery

* * * when the victim is intentionally killed" is a capital offense. The Act further provides that the Court shall consider the robbery as an aggravating circumstance. 7/ The trial court found the existence of two aggravating circumstances based on the same robbery: First, that the killing occurred during the course of a robbery; and second, that the killing was for precuniary gain. On the basis of Cook v. State, 369 So2d 1251, 1256 (Ala 1978), the Court of Criminal Appeals struck the finding that the crime was for pecuniary gain as an aggravating circumstance.

In Cook, the Alabama Supreme Court held that a trial court could not find two aggravating circumstances from one robbery. By definition, robberies are for pecuniary gain, but the court held that the "pecuniary gain" circumstance must not be applied to robberies. Likewise, Judge Bookout

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7/ Indeed, four of the crimes which carry the death penalty if they are conjoined with an intentional killing are specifically listed as aggrevating circumstances. Cf. Ala. Code §13-11-2(a)(1)-(4) with §13-11-6(4). All but one of the 14 types of capital crimes are arguably included within an aggravating circumstance. Listed below are each of the forms of capital charges and the aggravating circumstance (AC) within which each fits.

(1) Kidnapping for ransom: AC 4, kidnapping for ransom.
(2) Robbery: AC 4, robbery.
(3) Rape, etc.: AC 4, rape or, perhaps, AC 8, heinous crime.
(4) Burglary: AC 4, burglary.
(5) Murder of a peace officer: would probably be committed during some other crime (AC 4), to avoid arrest (AC 5), or to escape jail (AC 1).
(6) Murder while under sentence of life imprisonment: AC 1, under any sentence of imprisonment.
(7) First degree murder for pecuniary gain: AC 6, crime for pecuniary gain.
(8) Indecent molestation of a child: probably would be considered heinous, AC 8.
(9) Using explosion to kill: AC 3, creating risk of death to many persons.
(10) Two or more related murders: does not necessarily fit within any AC.
(11) Murder of public official and related to public business: AC 7, hindering or dispupting government or law enforcement.
(12) Hijacking: would be AC 6 if for ransom; otherwise would probably be AC 5, flight to avoid arrest.
(13) Murder by person convicted of first degree murder within the last 20 years: AC 2, conviction of previous crime of violence.
(14) Murder of witness in a criminal proceeding: AC 7, hindering law enforcement.

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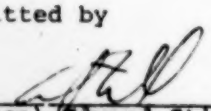
of the Criminal Appeals Court would have striken the "robbery" aggravating circumstance because the defendant is being condemned twice for the same robbery -- first when his crime was made capital and second when it is considered in aggravation. Common sense tells us that the same fact should not be used to define an offense and to declare that the commission of the offense was aggravated (that is, worse than the usual offense of this type). This Court should grant the writ of certiorari to review this system that so plainly "stack[s] the deck against" the defendant, Witherspoon v. Illinois, 391 U.S. 510, 523 (1968), and results in a distortion of "the balance of forces between the accused and his accuser," Wardius v. Oregon, 412 U.S. 470, 474 (1973).

If the Court accepts petitioner's position that robbery cannot be a definitional element and an aggravation of the crime, then petitioner's sentence was allowed to remain at death solely because he was already under a sentence for a violent crime. Under such circumstances, the Alabama courts should be given an opportunity to resentence the petitioner considering only the fact that petitioner was under a sentence for a violent crime.

CONCLUSION

For the reasons set out in this Petition, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Alabama.

Submitted by



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MAR 27 1979

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1978-79

2 Div. 238

Roger Scott Thomas

v

State

Appeal from Sumter Circuit Court

TYSON, JUDGE

Roger Scott Thomas was charged in a two-count indictment under Alabama's Death Penalty Statute, § 13 - 11 - 2 through § 13 - 11 - 9, Code of Alabama 1975 (Act No. 213, General Acts of Alabama 1975), for the intentional killing of William Beville by shooting him with a shotgun while in the commission of a robbery. The jury found the defendant "guilty as charged in the indictment" and fixed punishment at death by electrocution. Thereafter, the trial court conducted a post-conviction hearing on the aggravating and mitigating circumstances, as required by law. The trial judge then set punishment at death by electrocution after making specific findings on the aggravating and mitigating circumstances.

At arraignment the appellant entered a plea of not guilty, and a special venire was summoned in addition to the regular venire. Appellant's attorneys made a motion for a psychiatric examination

of the appellant at Bryce Hospital. The trial court then appointed three doctors to examine the appellant and to report back to the court their findings as to his mental competency and competency to stand trial, or if they found a reasonable ground that the appellant should be sent to Bryce Hospital and a lunacy commission appointed. After receiving the report from these doctors that the appellant was competent to stand trial and capable of understanding the charges and of cooperating with his attorneys, the trial court denied the request for further psychiatric evaluation.

A motion for a change of venue was denied following a hearing thereon, as was a motion to suppress the appellant's statement given to investigating officers.

During the voir dire of the venire, the appellant's attorneys challenged for cause one Robert Smith as a prospective juror. After further inquiry of Mr. Smith by the trial court, the appellant's challenge was overruled (Volume I, R. pp. 42 - 47).

Alabama ABC Agent Bobby Sewell testified that, on March 15, 1976, he investigated the reported death of one William Beville in Sumter County, Alabama, and that he was also acting as a deputy sheriff in this investigation. Sewell indicated that he accompanied Chief Deputy Wayne Cobb in a radio equipped car, in which they received a message about 7:00 to 7:30 on the morning of said date.

The two men proceeded directly to the trailer residence of William Beville, located on the Dr. Hester Circle Road, a dirt road leading to the Belmont community. When the officers arrived, the son of the deceased and the deceased's widow were present at the residence, as was the body of the victim, William Beville. The officers described the entrance door to the trailer as being a louvered type door through which you could see out if the louvers were open with a screen underneath. There were three steps leading to the front door, and just inside the door they found the body of William Beville "curled around the front door." The trailer residence was described as being ten feet wide. The officers observed a hole in the chest of the victim as he was lying on his side. The officers then radioed for Lt. Jones of the Criminal

Investigation Division of the Alabama Department of Public Safety. They remained at the scene to assist Lt. Jones with his investigation and the taking of photographs.

On cross-examination Sewell stated that it was daylight when they arrived at the trailer residence, that when they examined the louvered door and screen they noticed a hole in the corner of the screen about two inches in diameter, that that portion of the screen was removed for examination, and there was blood under the body of the victim.

Lt. George H. Jones, Alabama Criminal Investigator with the Department of Public Safety, testified that he received a message on the morning of March 16, 1976, concerning a shooting in Sumter County, and that he drove over there and met ABC Agent Bobby Sewell and Chief Deputy Wayne Cobb at a ten foot wide trailer residence of one William Beville near the Belmont community. Lt. Jones then identified several photographs which he made that morning of the door, the body of the victim curled around the door, and a hole in the screen about two inches in diameter. Lt. Jones stated that the hole in the screen "was about midway of a seven foot door," and the louvers of the door were glass and were open. He stated that Beville had been shot through the chest and was dead and that rigor mortis had begun to set in. Jones further indicated that he was unable to pick up any usable fingerprints, and that he requested an autopsy, which was performed by Dr. Richard Roper, State Toxicologist. Jones further indicated that he received a wallet which contained a Medicaid card with William Beville's name on it from Mr. Anderson at the Sumter County Sheriff's Office, and that the wallet and piece of screen, which was removed from the screen door, were turned over by him to Dale Bloomer at the State Toxicology Lab in Selma. Jones stated he also found one live twelve gauge shell, which was also delivered to Bloomer. Jones then identified several photographs that he made that morning of the scene.

Tom Beville, son of the deceased, William Beville, testified that his mother and father lived in their trailer residence on Dr. Hester Circle Road near the Belmont community of Sumter County on March 14 - 15, 1976. He indicated he was present at his parents' residence when Officers Sewell and Cobb arrived and was also there when Lt. Jones came. He stated that he subsequently saw his father's body at Weatherly's Funeral Home before the funeral. Tom Beville then identified a wallet which had been on the person of his father the day before the shooting and a J. C. Higgins single barrel pump shotgun which was in the corner of a room in his parents' home the day before the shooting. He stated he did not see the shotgun the next morning when he arrived and that he found his father's body lying on the floor.

Dale Bloomer, Criminalist with the State Department of Toxicology, stated he was employed at the Selma, Alabama, Lab on March 16, 1976. He stated that he received a package from Captain George Jones of the Department of Public Safety which contained a man's plaid shirt, a live Winchester, western .12 gauge Uplant shotgun shell, and a Playtex brand glove box containing one Playtex glove. He stated he went to Weatherly's Funeral Home and there received from Dr. Richard Roper an envelope containing a large mass of lead pellets and a small bag containing a black colored piece of granular material. Bloomer indicated that, on March 17, 1976, he received from Captain Jones a piece of plastic screen, approximately 9" by 9" with a hole in it and also a wallet containing a Medicaid card bearing the name of William Beville.

In examining the plaid shirt, Bloomer described two holes, a small hole about 2" above the shirt pocket, and a larger hole in about the right center of the shirt which was approximately 1" in diameter. He stated that he examined the shirt for nitrites and found decomposed parts on the shirt which indicated that the muzzle of the gun that produced the blast had been relatively near the shirt at the time the weapon was fired, and that the hole also indicated from the blast pattern it was a regular barrel rather

than a sawed-off barrel, which would spread the pattern of the shot. He identified the shell as being a No. 8 shot, .12 gauge, which he received from Captain Jones. He also determined that the shots that he received from Weatherly's Funeral Home during the autopsy, at which he was present, were also No. 8 shots, and that he observed Dr. Roper removing the shots from the victim's body.

Bloomer also stated that he examined the piece of plastic screen, which had been brought to him by Captain Jones, and performed certain tests on it, which determined there were nitrites and lead present on the screen. He stated that this indicated the muzzle of the shotgun was "quite near" at the time of the blast. Bloomer further stated that he examined the wallet, but it was wet at the time he received it and he could not obtain usable fingerprints and was not able to match any blood type on the wallet.

On cross-examination, Bloomer was asked his opinion as to the distance of the victim from the muzzle of the shotgun at the time of the blast, to which he replied, "Less than three feet."

Dr. Richard Roper, State Toxicologist, stated that he performed an autopsy at Weatherly's Funeral Home in York, Alabama, on the body of one William Beville. He described him as a well developed black male, about 5' 6" in height, weight between 120 and 125 pounds, and that his age had been stated to him as being 94. He stated that he removed No. 8 shotgun pellets from the chest of the deceased and determined that the middle section of the right lung was completely destroyed, the major arteries leading to the heart were also destroyed, that pellets were removed from the back of the body cavity near the backbone, and based upon his examination, death was the result of an acute hemorrhage due to a single shotgun wound to the body (Volume I, R. p. 89). Dr. Roper then identified a plaid shirt which he removed from the body of the victim and turned over to Dale Bloomer at the Funeral Home. Dr. Roper further indicated that he found small particles of the shirt in and about the fatal wound, indicating that the muzzle blast and lead pellets passed through the shirt before entering the body.

This autopsy was done on the evening of Monday, March 15, 1976.

Craig Bailey, Criminalist with the Department of Toxicology, then identified Exhibits nine and ten, nine being the shirt, and ten being the shotgun shell, and stated that these had been in his custody since delivery to him by Dale Bloomer. Bailey then identified Exhibit eleven, which was the shots delivered to him by Dale Bloomer in the lab, and which were determined to be No. 8 pellets; and Exhibit fourteen, a .12 gauge Iver Johnson shotgun, delivered to him by Mr. Ed Billingsley, which was test fired and determined to be in good working order.

James R. Anderson, an employee of the Sumter County Board of Commissioners, stated that he was doing some landfill work for the County Commission on March 16, 1976, when he drove to the Belmont community area in his truck. He stated that he came to an intersection where some trash containers were sitting, and about 150' to 200' therefrom he found a wallet which was wet and contained a Medicaid card with the name of William Beville on it. He indicated that at this intersection the dirt road, known as the Dr. Hester Circle Road, commenced. He indicated that he called the Sheriff's Department and turned the wallet over to Deputy Ed Billingsley.

Dale Bloomer was then recalled and testified that particles of nitrite, caused by burning powder, are usually found in the wound if the gun is discharged close to the victim. Bloomer indicated that particles of nitrite were found and removed from the wound on the victim, Beville.

Echols Cook, an employee of McGregor Printing in Sumter County, testified that he had known the appellant, Roger Scott Thomas, casually for a year or two. Cook indicated he also knew the appellant's sister, Earline Thomas Rogers. Upon examination of a shotgun, Cook stated that one night, he could not recall the exact date, the appellant approached him and asked him if he wanted a shotgun, to which he replied, "Not necessarily." Cook indicated that Thomas then laid the shotgun on the car and told him he could have it if he wanted it. Cook stated that he had

been doing some repair work on Earline Rogers' automobile when she asked him if he would carry the shotgun to his home, that she was afraid one of the children might get wounded with it. Cook stated that he then put the shotgun in his car and carried it to his home, then later turned it over to the Sheriff and Investigator Billingsley. He stated this was "about a year or two ago."

Earline Thomas Rogers stated that she was the sister of the appellant, Roger Scott Thomas, and that her husband was deceased. She indicated she was presently confined in Tutwiler Prison for Women, but in March, 1976, she lived in Sumter County, Alabama. Earline Rogers testified that, on March 13, or 14, 1976, she rode over to the Belmont community with her brother, Roger Scott Thomas, and one Scott Rhodes. She said that, when they went by the trailer residence of William Beville, Scott Rhodes engaged Beville in conversation. She said they noticed that Beville had a herd of approximately 150 goats, that they were crossing the road. She said they were told that the herd belonged to William Beville, the old black man who lived in the trailer near the Belmont community. She said that Scott Rhodes told them "Beville was a wicked old man," that this took place on a Wednesday, and the following Saturday she and her brother, Roger Scott Thomas, drove back out by the Beville trailer in a green and white Mercury. She said that night they drove near the old man's trailer, and her brother said he wanted to talk to him. She did not remember her brother mentioning "a goat," and that by the time of this second trip it was dark. She stated that they parked the car on the side of the dirt road, got out, and began walking toward the Beville trailer. She said she stood at the foot of the drive and saw her brother go up toward the trailer, that he did have a conversation with someone at the trailer, which she could not overhear. When her brother returned, he told her, "The old man did not answer the door and told me to get away from his house." She stated her brother told her he was going to challenge the man, that this was on a Saturday night, and there was some mention of the old man "having some money."

She testified that the appellant, Roger Scott Thomas, spent Saturday night and Sunday at her home. She said that the next day, Sunday, her brother told her that he wanted to go back out and talk to the old man. She stated that her brother wore dark pants and had on a green cap. She further stated that her brother took a shotgun and she carried a .22 pistol, that they left driving in the green and white Mercury about 8:00 to 8:30 p. m. to go to the Belmont community.

Earline Rogers stated that, on Sunday evening, they arrived at the trailer shortly after 8:30 p. m., and parked the car on the side of the dirt road below the Beville house trailer. She said the appellant told her to wait at the car for about ten minutes, and he got out, carrying the shotgun. She said that, in a few minutes, she got out, but that she never did get near the trailer. She said she could hear some voices, and in a few minutes she heard a "boom," like a shotgun (Volume I, R. p. 121). She said she waited, and, in a few minutes, she heard a noise like something had fallen, and heard her brother tell someone to "turn around." She then saw that it was the old woman and heard her brother tell her to cooperate or the same thing would happen to her. He was holding a shotgun on the woman, and told her to face the wall. She said the old woman had a coat over her head, and that she faced the wall away from her brother. She saw the body of a black man lying on the floor, he was not moving, and her brother told her to look around the trailer for money. She stated she went into the bedroom and bath, but did not find any money, but saw her brother getting a billfold, and later saw him take, she thought, about $26.00 from the billfold, and that he also took a lady's watch, which he later gave to her. She stated she kept the watch from March until November, 1976, when she gave it to Sheriff Melvin Stephens. She said that a shotgun was in a corner, that her brother picked it up and brought it with him. She stated they were at the trailer about fifteen minutes, and her brother told the old lady not to move, for if she did he would come back and shoot her.

She said that, after getting back in the car, they drove away, and her brother took the money and threw the billfold out near an intersection.

On cross-examination, Earline Thomas Rogers stated that nobody had threatened her to get her to testify, but she had been told, if she told the truth, her charge would be second degree murder. She also stated that she had talked with her lawyer before talking with the district attorney about testifying, and that she was the one who brought up the matter concerning testifying.

On cross-examination, Earline Thomas Rogers testified she was the mother of seven children, the oldest being fourteen, and they had been living with her on a housing project in Sumter County, Alabama. She said her parents had died when her brothers and sisters were very young, and they had been raised in foster homes since they were children. She said she was thirty-two, five years older than her brother, the appellant, Roger Scott Thomas. She said that, in March, 1976, her husband was dead, and she was on welfare and not working regularly. She denied that she carried the pistol to the Beville residence to be a lookout for her brother, and that her brother already had a shotgun, which he carried with him when they went out to the Beville trailer.

O. E. Billingsley III testified he was a district attorney investigator in March, 1976, and investigated the shooting death of William Beville. Mr. Billingsley stated that he was known as Ed Billinglsey and had talked with the appellant, Roger Scott Thomas, in the Sheriff's Office concerning the case on November 20, 1976, after receiving a telephone message from the jailer that the appellant wished to talk with him. He stated that earlier he had been contacted by Florida authorities and had transported the appellant, on the Tuesday prior to Sunday, November 20, 1976, from Avon Park, Florida, to the jail at Sumter County, Alabama, that he was accompanied by Deputy Sheriff Tommy Walton. He stated that it took the two officers about twelve hours driving time to cover the distance from Avon Park to Livingston, Alabama. He stated

that there was no discussion of the Beville case on the trip. Deputy Billingsley indicated that, on the night of November 20, 1976, when the jailer called him, the only people present were Sheriff Melvin Stephens, the appellant, and himself, and that, after talking with him, a Miranda rights card, which the appellant stated he understood and read over, and stated he understood fully his rights, was read to him. He stated that the appellant was not under the influence of drugs, alcohol, or any other disability at this time. Billingsley indicated that he made no offer, threat, hope of reward, or any inducement, or any type of intimidation in order to obtain a statement. He stated that he and the sheriff used a Sony tape recorder and made a tape of the conversation with the appellant, that they had previously tested the machine and found it to be in good working order. Specifically, Investigator Billingsley said that he asked the appellant if he wanted an attorney, Mr. Bob Upchurch, who was representing him in a case involving a robbery and two burglaries in Sumter County, to be there, and talk with him, while he was giving the statement concerning the death over at Belmont. He said the appellant replied that he did not want a lawyer present, that he wanted to talk with him voluntarily. The appellant then signed a waiver of his Miranda rights and signed a statement after a verbatim tape was made of the conversation.

The jury was excluded from the courtroom while the appellant's counsel made a voir dire examination of Deputy Billingsley concerning the circumstances of taking the statement and the taping of the statement by Investigator Billingsley and Sheriff Stephens on the Sony tape recorder. After determining that the appellant had been properly advised of his constitutional rights, and that there had been no threat, intimidation, hope of reward, or other inducement to obtain same, the trial court determined that the statement was "voluntarily obtained," and that the court would allow Deputy Billingsley to proceed with his testimony concerning the conversation (Volume I, R. p. 150).

Investigator Billingsley also testified that the tape was in his sole possession and had been after taking the appellant's statement except to turn it over to Pamela Wooldridge, secretary for the District Attorney's Office, who, at Billingsley's request, transcribed the tape, then turned the tape and the transcription over to him. He stated that he examined it to make sure there had been no changes, corrections, or erasures.

The trial court then had the tape played, and, after determining that it would exclude a portion of the tape which contained information with reference to another offense, admitted the Miranda waiver, the portion of the tape which pertained to the Beville shooting, and the statement given into evidence.

Investigator Billingsley stated that there was no conversation on the trip back from Florida concerning the Beville matter, but he did show Thomas a watch, and Thomas told him he did not want to discuss the matter. Billingsley said that was the extent of the conversation during the trip back from Florida. Billingsley then examined a photograph and a piece of plastic screen. He stated that he cut the portion of screen from the louvered door, that it was plastic material, not metal, and that he placed it in an envelope and delivered it to Criminalist George H. Jones of the Department of Public Safety.

On cross-examination, Billingsley stated he was present when Earline Thomas Rogers gave a statement in the law office of Mr. William Brewer, an attorney in Livingston, concerning the Beville shooting, and that Sheriff Stephens was also present. Billingsley indicated that the statement taken from Earline Thomas Rogers was obtained before bringing the appellant back from Avon Park, Florida, to Livingston, Alabama.

The appellant's statement, which is contained in the taped interview, was introduced into evidence (Volume I, pp. 172 - 181) and is hereby made Appendix A to this opinion as the same appears of record in Volume II, pp. 344 - 351.

It is noted that Investigator Billingsley admitted that he knew Attorney Bob Upchurch represented the appellant, but he did not contact him with reference to the interrogation of the appellant (Volume I, pp. 185 and 191). From this interview, it was learned that the appellant had left the weapon used in the Beville shooting with Echols Cook in York, Alabama, and there obtained a single barrel .12 gauge shotgun, which is State's Exhibit fourteen (Volume I, p. 186). Billingsley also indicated that he obtained a woman's watch from Earline Thomas Rogers while she was at the office of Attorney Brewer, her lawyer in Livingston, that he subsequently showed it to the appellant, and later it was admitted into evidence as State's Exhibit seventeen.

On redirect examination, Mr. Billingsley indicated that the appellant was on parole at the time of the Beville shooting.

Sheriff Melvin Stephens indicated he worked in the investigation of the death of William Beville, which occurred on or about March 16, 1976. He indicated that he went to the scene of the homicide and later was present when Deputy Ed Billingsley interviewed the appellant at the Sumter County Jail on November 20, 1976, which statement was taped and later transcribed by the secretary in the District Attorney's Office.

Sheriff Stephens indicated that two days later, November 22, he and Investigator Billingsley talked to the appellant the second time, and on this occasion the appellant told them to go see one Echols Cook, that there they could find out information about the weapon used. Sheriff Stephens stated they went to York, Alabama, and contacted Cook at McGregor Printing Company, and as a result they recovered the shotgun used in the homicide in question. Sheriff Stephens also indicated that the first time he saw the woman's watch, Earline Thomas Rogers had it, and she later turned it over to them.

At this point, by agreement of the parties, the taped interview, which had been transcribed and placed in evidence in that form earlier, was then played for the jury (Volume II, pp. 202 - 203). This is made Appendix B to this opinion.

Roger Scott Thomas stated that he was confined at the Sumter County Jail, having been there since November 15, 1977. He stated that prior to this date he had been incarcerated at the Florida State Prison at Avon Park, Florida, and had received penitentiary sentences in both Alabama and Florida previously. He stated that his father died when he was two, and his mother died when he was five, and that he had been placed in a foster home when he was six years of age. He stated that his sister, Earline Thomas Rogers, was living in York, Alabama, with her children, and that he had been staying at her place in the housing project in March, 1976. Thereafter the appellant's testimony confirms his visits to the Belmont community and to the home of William Beville, as related in his statement, and in the taped interview.

The appellant testified, however, that he could not see inside the trailer when he went up there on the night of the shooting, that he wanted to explain to the man about some car trouble, that he heard the woman back away from the door, and he stuck the shotgun inside the louvered window on the door and fired. He stated that it surprised him quite a bit that he had shot anybody because he heard the woman's voice as she moved back away from the door. The appellant denied intentionally shooting William Beville, or knowing that he was at or near the door of his trailer at the time he fired the shotgun through the louvered door (Volume II, p. 210).

On cross-examination, the appellant admitted a conviction of robbery in Sumter County, Alabama, and a second conviction of robbery in Greene County, Alabama. Appellant also stated that he was convicted of second degree murder in Florida, which was in settlement of a case. He also stated that he had served an earlier sentence in the State of Mississippi. The appellant denied that he had any intent to kill William Beville and stated that he was first made aware about "old man Beville" through Scott Rhodes. He stated that when he realized he had shot the man, "he was really scared to death and was really upset." He admitted that

he was two to three feet from the door when he fired the shotgun. He stated that he saw the wallet in the man's pants pocket, and that the pants were hanging on a chair when he removed the wallet.

The State then recalled Investigator Billingsley, who stated that he had a subsequent conversation with Roger Scott Thomas at the Sumter County Jail in either March or April, 1978. He stated that the appellant began the conversation by asking him if he were the man that "had no compassion, the man who had no feeling toward anyone." Billingsley indicated that he was having a conversation with another inmate at the jail, and the appellant spoke the second time and made the following comments (Volume II, p. 223):

> "A. He had made the statements, you have no compassion, you have no feeling for a man, or anything, and he made the statement, you're trying to put me in the electric chair; trying to put me to death. I said, did you have any compassion on the old man when you shot him over there at Belmont. He said, old man was old, said, the old man was 90 years old. Everybody's got to die sometimes."

Thereafter the trial court gave an extensive oral charge, to which there was no exception taken.

I

The appellant contended through his attorneys at trial that the Alabama Death Statutes under which he was convicted were unconstitutional because the trial jury could not consider the aggravating or mitigation circumstances, thus, making the death penalty mandatory and violative of the Eighth and Fourteenth Amendments to the United States Constitution. This issue has been determined adversely to the appellant by the Supreme Court of Alabama, so we need to dwell no further on this point. Jacobs v. State, Ala. Cr. App., 361 So. 2d 607 (1977), affirmed, S. Ct., Ala., 361 So. 2d 640 (1978); and Evans v. State, Ala. Cr. App., 361 So. 2d 654 (1977), affirmed, S. Ct., Ala., 361 So. 2d 666 (1978).

II

The appellant asserts as error the trial court's denial of his challenge for cause of the veniremen, Robert Smith. This colloquy, following questions asked by the State's attorney and the defense counsel, covers several pages and includes

questions from the trial judge as well. The attorneys explained to the members of the venire that only two possible verdicts could be brought in under the Alabama Statutes (Volume I, pp. 40, 41), and when initially asked by the trial court, Venireman Smith, in response to the question, "If you had a question about the intent is there anyone here that would find him guilty anyway" replied, "I believe I would probably find him guilty" (Volume I, p. 44). Appellant's counsel challenged for cause.

Counsel for the State then asked the following (Volume I, pp. 45 - 47):

> "MR. WATKINS: That is one of the requirements and one of the essential elements in this case. Would you require the State of Alabama to prove to you beyond a reasonable doubt that his man intentionally killed the deceased? Would you make that requirement, which the Judge is going to tell you is the law?
>
> "MR. SMITH: Yes.
>
> "MR. WATKINS: Then, if you're not convinced beyond a reasonable doubt that he intended to kill the deceased, then you would be able to find him not guilty, would you not?
>
> "MR. SMITH: Right. If clear cut.
>
> "MR. WATKINS: All right. I would oppose the challenge for cause.
>
> "MR. BOGGS: I still challenge for cause.
>
> "THE COURT: Before I rule I want to ask you one more time, Mr. Smith. If the evidence were such that there was a reasonable doubt in your mind as to the innocence or guilt of the defendant, would you be able to return a verdict acquitting the defendant; that is, turning the defendant aloose, returning a verdict of innocence, if there was a reasonable doubt in your mind as to whether it was an intentional killing or not? If there was a reasonable doubt in your mind, would you be able to return a verdict finding the defendant not guilty?
>
> "MR. SMITH: Yes, if it was a reasonable doubt; a clear reasonable doubt.
>
> "MR. WATKINS: Semantics, Judge, reasonable doubt.
>
> "MR. BOGGS: I know and such semantics, I think he ought to be challenged for cause for justice to be done, Your Honor.
>
> "THE COURT: Based on Mr. Smith's answer that if there were a reasonable doubt in his mind that he would acquit the defendant, I'm not going to grant a challenge for cause in that particular case.

"MR. BOGGS: We except, Your Honor. Is there anyone on this jury panel that if you were the only one; if you were the only one, Mr. Smith, everybody else wanted to electrocute Roger Scott Thomas, you said, well, based on the evidence I'm not sure that he intentionally killed him. I believe that he killed him, but I don't believe that he intentionally did it, so I'm not going to vote to electrocute him; would you stay there for two days if necessary or would you go ahead and vote guilty, if you believed he shot him?

"MR. SMITH: I would follow my own.

"MR. BOGGS: What would that be?

"MR. SMITH: If the evidence showed that he didn't intentionally kill him, it would be not guilty.

"MR. BOGGS: All right. You're convinced of that?

"MR. SMITH: Yes, sir.

"MR. BOGGS: Does everyone else feel the same way?

"THE COURT: Let the record show that that last statement was made by Mr. Smith."

As may be seen in the above colloquy, prospective Juror Smith indicated that if he were not convinced that the appellant intentionally killed the deceased and he had a reasonable doubt, he would vote not guilty. Under these circumstances, we believe the trial court correctly overruled the appellant's challenge for cause. See Witherspoon v. Illinois, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776; and Davis v. Georgia, 429 U. S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339.

III

The appellant challenges the admission into evidence of the appellant's statement made to Investigator Billingsley at the Sumter County Jail after a Miranda warning, but contends that the same should have been excluded because Deputy Billingsley admitted knowing the appellant was represented by counsel and yet proceeded to interrogate the appellant without contacting Mr. Upchurch, the attorney.

Judge Bowen, speaking for this Court in Alexander v. State, 8 Div. 170, March 6, 1979, stated:

> "The fact that a defendant has an attorney does not mean, as a per se rule, that law enforcement officials cannot procure a statement of any kind from the defendant without prior notice to, if not the consent of, the attorney. This rule was fully discussed and applied in Thompson v. State, 347 So. 2d 1371 (Ala. Cr. App.), cert. denied, 347 So. 2d 1377 (Ala. 1977). In Brewer v. Williams, 430 U. S. 387, 97 S. Ct. 1232, 1243, 51 L. Ed. 2d 424 (1977), the United States Supreme Court implicitedly rejected any such 'per se' rule.

As may be seen in examining the statement itself, as given to Investigator Billingsley by the appellant, and the deputy's Miranda warning, the voluntariness predicate, the appellant indicated that he was aware that his counsel could be present and would be called, but did not desire the presence of his attorney before conferring with Investigator Billingsley. There is no contention that there was any inducement or trick, or artifice, used, the record in this cause being to the contrary.

While this Court indulges every reasonable presumption against waiver of the right to counsel, and such must be affirmatively demonstrated, knowingly and intelligently, we find that, in accordance with the trial court's findings, such was here done. The appellant's constitutional rights were carefully protected, and there was no indication of any improper influence or suggestion whatever. Our conclusion is based upon the uncontradicted evidence that the appellant voluntarily waived this right.

The record is also clear that a full Miranda warning was given the appellant, and there was no improper influence, threat, intimidation, coercive factors, or other inducement made to obtain the statement. We hold that the trial court properly admitted the appellant's statement into evidence. Alexander, supra, and authorities herein cited.

Moreover, the appellant here took the stand and fully admitted his participation in the shooting death of William Beville on the night of March 14 - 15, 1976, in Sumter County.

His sole contention appears to be that such was not done "intentionally." This was a factor for the jury's consideration, based upon all the evidence in the cause. Where, as here, the appellant has taken the stand and testified to essentially the same facts, as contained in "his confession," we cannot say that error should be ascribed to the admission of the statement in question. See Boulden v. State, 278 Ala. 437, 179 So. 2d 20; and Jones v. State, 50 Ala. App. 36, 276 So. 2d 36, 276 So. 2d 621, and authorities therein cited.

IV

The appellant's counsel contends that reversible error occurred during the following colloquy (Volume II, p. 226)which occurred during closing argument in this cause:

> "MR. BOGGS: I object to that. That's highly improper.
>
> "MR. WATKINS: Your Honor, he opened it up. He eluded to the fact that he'd serve the rest of his life in the penitentiary and I feel I have a right to tell them what a short time.
>
> "MR. BOGGS: I object, Your Honor. He's testifying now before you rule.
>
> "THE COURT: Overrule the objection. He's replying in kind.
>
> "MR. BOGGS: Your Honor, I think that is incorrect. I was not authorized . . now to testify as to the great number of years; now he's talking about the number of years until parole. It's highly prejudicial.
>
> "MR. WATKINS: You said the rest of his life.
>
> "THE COURT: Overrule your objection. He's replying in kind.
>
> "MR. BOGGS: I object again, Your Honor. It's prejudicial and inflammatory.
>
> "THE COURT: Sustained.
> (Whereupon, the District Attorney concluded his closing argument to the jury, and with no further objections being made, the Court charged the jury as follows:)

As may be seen in the above colloquy, the trial court's final ruling was to sustain the appellant's counsel's objection

to the alleged prejudicial argument.

No further ruling was made by the trial court, nor was there a request by way of motion to exclude, motion for a mistrial, or other request made of the trial court to clarify its ruling.

Further, the statements hereinabove quoted verbatim from the trial court's record are fragmentary, and thus their alleged prejudicial effect is not fully presented for our review. McClary v. State, 291 Ala. 481, 282 So. 2d 384.

While we fully agree, and the law is clear, that the State's attorney may not argue to the jury certain prejudicial matters, Whisenhant v. State, 6 Div. 634, February 20, 1979, nevertheless, we are clear to the conclusion that a case for reversal has not been made by the colloquy herein quoted from the record in this cause.

V

We carefully note that the trial judge here conducted a post jury sentencing hearing and inquired into the aggravating circumstances as well as the mitigating factors, established by the record in this cause. Section 6, Act No. 213, Acts of Alabama 1975 (§ 13-11-6, Code of Alabama 1975). Extensive findings were made by the trial judge, which are here made Appendix C to this opinion (Volume II, pp. 279 - 28

The trial judge in his order noted the aggravating circumstanc which were here averred and proved at trial, and also determined by the trial judge in the post sentence hearing,as required by law. Additionall this Court has carefully weighed the aggravating and mitigating circumstances independently.[1 & 2]

We are of the opinion that the punishment here imposed fits the crime for which the appellant has been found duly guilty.

The judgment of conviction and sentence of death is in all respects

AFFIRMED.

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1. This court specifically rejects aggravating circumstances three and four in Appendix C,as such would be condemning the appellant twice for the same offense, involving an attempt at pecuniary gain. See Recardo Cook, Ala. S. Ct. No. 77-320, 13 ABR 736.

2. We express grave doubt as to the applicability of aggravating circumstance five, Appendix C,to the facts of this case. See Jacobs v. State, 361 So. 2d 607, which adopts State v. Dixon (Fla.), 283 So. 2d 1, defining this language.

ALL THE JUDGES CONCUR.

Q MR. WATKINS: (continuing) Go ahead.

A I asked the question: You have no objections to the fact that I record it, do you? Roger Thomas answer: No objection. I asked the question: Now, a moment or two ago before I got this tape recorder out, here on the table is a paper entitled, Statement of Miranda Rights and it states some 5 items and a line is drawn and you have signed it. These were read to you and you understand it, is that correct? Roger Thomas: Yes, sir. I asked the question: And, you signed this voluntarily without any offer or reward, or force, or threat, or anything else, is that correct? Roger Thomas: That's right. I asked the question: Then there is a waiver of these rights and you have signed there advising that you waive; and I advised you before you signed those that you did not have to...that you do have an attorney, Mr. Bob Upchurch, who is representing you. I told you that I wanted to talk to you about the Beville death over in Belmont and you advised me that you were willing to talk about that, even understanding that you didn't want a lawyer present, is that correct? Right. Roger Scott answered: Right. I asked the question: And, you're doing this voluntarily without any force, or threat, or offer of reward, or inducement of any kind? Roger Thomas answered: Right. I asked the question: And, you have signed in these two places; are your signature, is that correct? Roger Thomas answered: Yes, sir. I asked the question: I'm going...I am signing here where it says witness. You're seeing me sign at this time, is that correct? Roger Thomas answered: Yes, sir. I asked the question: Sheriff Melvin Stephens is here and hearing all that is said between you and I, is that correct? Roger Thomas answered: Yes, sir. I asked the question: You understand the last item here, that you can decide at any time to exercise these rights and not answer any questions or anything at all in connection

with this. Do you understand that? Roger Thomas answered: Yes, sir. I asked the question: What do you want to tell me about it, Roger? Roger Thomas answered: Well, I'll just leave all the questions up to you. I asked the question: I understand that you and Earline went to a William Beville's trailer over at Belmont on a dirt road, back in March, March 14th, 1976, on a Sunday night, is this correct? Roger Thomas answered: Yes, sir. I asked the question: And, that..when you went there you went with a shotgun, is that correct? Roger Thomas answered: Yes, sir. I asked the question: Did Earline go with a pistol when she went there? Roger Thomas answered: She had a rifle. I asked the question: Had a rifle? Was there anyone else with you when you went there? Roger Thomas answered: No, sir. I asked the question: And, you went in Earline's green Mercury or your white Buick? Roger Thomas answered: It was in her green Mercury. I asked the question: When in her green Mercury, when you went there, about what time of day or night was it, Roger? Roger Thomas answered: I'd say it was about 9:00, approximately 9:00. I asked: At night? Roger Thomas answered: Yes, sir. I asked the question: When you got there, what did you do? Who went...now, this trailer, would you describe where the trailer was situated in relation to the road? Do you recall? Roger Thomas answered: Well, going to the fishing spot up there, it's on the right side of the dirt road; it's up on a bank on the right-hand side going. I asked the question: And, was it just a house trailer, or did it have any other kind of building or structure or anything around it, if you recall? Roger Thomas answered: Well, it had some sort of shed out in front of the trailer house. I asked the question: Okay. Had you been there the night before? Roger Thomas answered: Yes, sir. I asked the question: The night before had the man in the house told you to go on, or to leave, or something to this

effect. Roger Thomas answered: Yes, sir, he said that he didn't have no phone or nothing like that that we could make a call. I asked the question: What had you gone there the night before for? What was the purpose of your going there? Roger Thomas answered: Well, we were intending to rob the man the first night there, but we couldn't get him out of the house, and that first night we didn't want to have to do no shooting up in the house, but our main purpose was to get the robbery done. And, so after he didn't come out of the house that first night, it seemed to us the only way we were going to get up in there was by shooting up in there and demanding. I asked the question: Forcing your way in? Roger Thomas answered: Yes, sir. And, so the second night we went there and uh I started to put the same questions to him about. I asked the question: What was some of these questions, please, sir? Roger Thomas answered: Well, uh like we had car trouble down the road with our car and we wanted to use the telephone to get a service truck out there; and those shoes, I don't know where that came in at. Roger Scott Thomas laughed. Then, I asked the question: You didn't ask about any shoes or didn't try to sell him..tell him you had some shoes you wanted to sell? Roger Thomas answered: No, we didn't mention anything about shoes. I asked the question: Was Earline up at the house with you? Roger Thomas answered: Well, uh she was around the side of the house at the time. I asked the question: Who came to the door on the Sunday night? Roger Thomas answered: Well, it was a woman come to the door at first, but she didn't answer, you know, she just...when she saw me outside, she backed up from the door. I asked the question: Was there a television on, or were they up, or were they in bed, or do you know? Roger Thomas answered: There was a television on. I don't know whether they were in bed or not, except this woman, she was at the door. When

she backed up she said something to the man that was in the house with her. You know that..you know, and that's when I put the gun through the door and I shot inside and I guess he was standing, or had come out of the bedroom at the time; see, cause the bedroom is really not far from the door. I asked the question: Now, when you shot you said you put it through the door: describe that for me; how you did that? Was there a hole in the door or window there, or what? Roger Thomas answered: There was a roll in sort of roll in type. I asked the question: A louver where you open them up or close, like my hand is straight up and down and then if you open it, it comes up kinda like that, is that the way it was? Roger Thomas answered: That's right, sir, so when I shot in there I heard something hit the floor, so when I..I of course, looked in, I saw the man, he had hit the floor from standing side of the door where I had poked the gun through at. I asked the question: Did you shoot through a screen, or was there a screen there, or do you know? Roger Thomas answered: I think it was a screen on the inside of the windows. I asked the question: How did you get inside? Roger Thomas answered: Well, I told the woman to open the door then. I asked the question: Did she? Roger Thomas answered: Yes, sir. And, I asked the question: Then what did ya'll do or what did you do? Roger Thomas answered: Well, I checked. Pearline went on and I told her to check the bedroom out for money or whatever she could find, and I checked the man out to see was he dead and all. I asked the question: Was he? Roger Thomas answered: Yes, sir. So, I took a coat and covered his head up and I told the woman to just turn around and watch television, and I advised her that we wasn't going to shoot her or anything if she just cooperated and all.

She said she would.' She begged us not to shoot her. I just told her she didn't have to worry about that, you know. Then, I asked the question: Did you have any kind of mask or anything on? Roger Thomas answered: I had a stocking on. I asked the question: Ladies type stocking pulled down all the way over your face? Roger Scott Thomas answered: Yes, sir. I asked the question: How was Earline dressed? Roger Thomas answered: She had on a blue winter, one of those.. I asked the question: Toboggan type cap ; knit. Would it cover her face? Roger Thomas answered: Yes, sir, I think it would go all the way down to her chin at least. I asked the question: Did she have anything she could see out..her eyes open? Roger Thomas answered: She had the holes cut in it. I asked the question: What did you get out of the trailer? Roger Thomas answered: We got some shotgun shells and a shotgun that was in the men's bedroom, and we got a watch, I believe. I think it was just one watch. I asked the question: Ladies watch? Roger Thomas answered: Yes. Yes, sir. I asked the question: What kind of shotgun was it? Roger Thomas answered: It was a .12 gauge pump. I asked the question: What did you do with that? Roger Thomas answered: I had it up there in Missouri at my brother's house, Kansas City, Missouri. That's where I left it at. I asked the question: At Jessie's house? Roger Thomas answered: Yes, sir. I asked the question: Do you remember what make or brand it was? Roger Thomas answered: No, sir. I asked the question: Now, the watch. What happened to that? Roger Thomas answered: I left it with Pearline. She had it. I asked the question: Do you recall the other day when

we came back from Florida, before we ever left down there, I advised you of your rights at that time. Roger Thomas answered: Yes, sir. I asked the question: And, you understood them, didn't you? Roger Thomas answered: Yes, sir. I asked the question: Do you recall showing...do you recall me showing you a watch during this trip back: a ladies watch? Roger Thomas answered: Yes, sir. I asked the question: Did that look like the one, in your judgment, or do you have an opinion at all? Roger Thomas answered: That looks exactly like the one. I asked the question: Okay. Now, did you get a bill..billfold from either the man or the woman, or anything, that night? Roger Thomas answered: I got a wallet out of his pocket. I asked the question: Okay. What did you do with that? Roger Thomas answered: I believe we threw it out the window, I guess, or somewhere. I believe it was on the dirt road there..we threw it out the window after getting out the few bills that was in it. I asked the question: How much money did you actually get? Do you recall? Roger Thomas answered: I believe it was about $16.00. I asked the question: That was out of the man's billfold? Roger Thomas answered: Pearline fount about..I think she fount a $10 bill under the mattress, and I believe she had $6 in the wallet. I asked the question: Okay, and you threw this billfold out somewhere after you left there? Roger Thomas answered: Yes, sir. I asked the question: Now, did you ever pull anything over the woman's head, or her at all, in that house? Roger Thomas answered: I told her to lay down on the couch. I covered her with a blanket; covered her head up with a blanket before we left. I asked the question: Did Earline ever say anything there that night? Do you recall? Roger Thomas answered: She didn't actually say anything; but, of course, you know, not where she could be heard, but she was motioning to me. I asked the question: I see, but what

was spoken and said as far as being directed at the man or the woman; and the woman after the man had been shot, you did all of that, is that correct? Roger Scott answered: Yes, sir. I asked the question: I mean as far as the major talking between you and the victim, or the woman that was there? Roger Scott answered: That's right. I asked the question: What caused you to go to the house to start with? Why did you go there looking for money? Did you have somebody tell you something, or think something, or what? Roger Scott answered: Well, someone had told Pearline about the man was suppose to have a lot of money; Pearline had told me about it later on after she was told and she said it in such a way to me, you know, for me to understand that she wanted me to know..go out there and try something. I asked the question: Help her with it? Roger Scott Thomas answered: Yes, sir. So, we agreed together since I knew that's what she was wanting to, you know, and I needed money myself too. I asked the question: She knew that at that time, didn't she? Roger Scott answered: Yes, sir. I asked the question: The shotgun that you used; where did you get that? Roger Scott Thomas answered: I believe on 17, run through York crossing the bridge right out of town. I asked the question: What did you get, or when did you get that gun? Roger Thomas answered: I guess about 3 or 4 weeks earlier. I asked the question: Did you cut the barrel off? Roger Thomas answered: Yes, sir. Sheriff Stephens asked a question: Was that in York? Roger Thomas answered: I think it was more or like down in Choctaw County. I don't know. It's right across that bridge. I forget the name of that creek. I asked the question: Alamuchee Creek? Roger Thomas answered: You know, it's the first creek going south toward 80, right out of York. I asked the question: Was it a single barrel shotgun? Roger Thomas answered: Yes, sir. I asked the question: What did you do with

it? Do you know? Roger Thomas answered: Let me see. I don't know just what became of that gun. I asked the question: Did you cut the barrel off? Roger Scott answered: Yes, sir. I asked the question: Did you cut the hand stock off too? Roger Thomas answered: Yes, sir. You don't remember what you had done with that gun? Roger Thomas answered: No, sir. I asked the question: Is there anything else about that robbery over there that you want to tell me or ask me, Roger? Roger Thomas answered: Not as I know of so far. Sheriff Stephens asked a question: Can you describe the subject. I asked a question: The man that was shot. Sheriff Stephens: The man that was shot..yourself..didn't you see him; can you describe him? Roger Thomas answered: Well, I saw him after we got in the trailer, yes, sir. I asked the question: White man or black man? Roger Thomas: I reckon he was mixed. I asked the question: Light skin? Roger Thomas answered: He was pretty light skinned. I asked the question: Young man or old man? Roger Thomas answered: He was an older fellow. I asked the question: How was he dressed? Do you recall? Roger Thomas answered: In some work pants. I can't describe what kind of shirt it was. I asked the question: What part of the body did the shotgun load hit him in? Roger Thomas: In the stomach section. I asked the question: Now, what kind of shots did you have in there? Roger Thomas answered: .12 gauge, I believe. I asked the question: Do you know what kind of shot: 6 or .8, buckshot, or what? Roger Thomas answered: No, sir. Sheriff Stephens asked the question: How was the weather that night? Do you remember? Roger Thomas answered: It was raining. I asked the question: Rainy weather. Anything else you want to ask me or tell me about it? Roger Thomas: No, sir, I guess I had better not. Roger Scott Thomas laughed. Then I asked the question: What do you mean by that?

Roger Scott Thomas answered: Always wished the old woman well. The old woman that was there, you know. I don't know how she felt about it afterwards, but I imagine pretty bad. I kinda regretted after all, me having to carelessly poke the thing up through the screen there, which first thing when I went there, I thought many times after that, I should have used the .22, but heck, I don't know, I would have probably got my own brains blown out, but come to find out he did have enough up in there to do so. I asked the question: Did he ever threaten you with a gun the night before? The first night that you went there, Roger. Roger Thomas answered: No, sir. I asked the question: He didn't? You never saw him with a gun? Roger Thomas answered: No, sir. Sheriff Stephens asked the question: Where did you say you left that gun? Roger Thomas answered: Up in Missouri with my brother at his house: Jessie. Sheriff Stephens: The one that's up here now. Roger Thomas: Yes, sir, I guess he's here. Myself answered: He's here. Sheriff Stephens asked the question: Do you have any idea where it is now; that gun? Roger Thomas answered: I don't know. He ought to know where it is..where it's at 'cause I left there at the house. Sheriff Stephens asked the question: I'd like to get the gun back and give the gun to his son. He gave the gun to his son. I'd like to get it back. I asked the question: But, you don't..you left it with him and when you were arrested, you don't know what he did with it. Roger Thomas answered: I had it in my property; all my property. I usually kept all my stuff together there at my house.

Q Now, Mr. Billingsley, did you have a later conversation with Roger Scott Thomas, after this conversation, regarding the shotgun?

A I did.

Q When was that and where was that?

A The statement was taken on Sunday night, November 20, on Tuesday, the following Tuesday, November 22, 1977, I talked with Roger Scott Thomas.

Q Did you again advise him of his rights?

A I did.

Q The same rights that you testified that you advised him to on November 20?

A I did.

Q Did he understand those rights?

A He did.

Q Where was he at that time?

A Sumter County Jail, Livingston, Alabama.

Q Who was present?

A Myself and Sheriff Melvin Stephens.

Q Did he make a statement regarding the shotgun?

A He did.

Q What did he tell you?

MR. BOGGS: I object to this, Your Honor, this new statement. It's the first I've heard about it. There's nothing in here about it. And, at this point, I say that there's not enough ground work laid, nor enough predicate laid to show it was a voluntary statement and that he was properly advised of his rights, and we object.

THE COURT: Let's take the jury out. Mr. Shaw will you take the jury back to the juryroom while I take this matter up.

(Whereupon, the bailiff took the jury back to the juryroom, and the following was taken up outside the presence of the jury.)

Q MR. WATKINS: (continuing): What rights did you advise

between myself and the District Attorney and with concurrence of the court, at this point I would like to play a portion of the tape for the jury.

(Whereupon, the following portion was played for the jury)

EDD BILLINGSLEY: What had you gone there the night before for? What was the purpose of going there?

ROGER SCOTT THOMAS: Well we was intending to rob the man the first night there but we couldn't get him out of the house and that first night we didn't want to have to do no shooting up in the house, but our main purpose was to get the robbery done and so after he didn't come out of the house that first night it seemed to us that the only way we was going to get up in there was by shooting up in there and demanding...

EDD BILLINGSLEY: Forcing your way in?

ROGER SCOTT THOMAS: Yes, sir, and so the second night we went there and uh I started to put the same questions to him about...

EDD BILLINGSLEY: What was some of these questions, please, sir?

ROGER SCOTT THOMAS: Well like uh we had car trouble down the road with our car and we wanted to use the telephone to get a service truck out there and those shoes, I don't know where that come in at. (Roger Scott Thomas laughs)

EDD BILLINGSLEY: You didn't ask about any shoes or didn't try to sell him, tell him you had some shoes you wanted to sell?

ROGER SCOTT THOMAS: No, we didn't mention anything about shoes.

EDD BILLINGSLEY: Was Earline up at the house with you?

ROGER SCOTT THOMAS: Well uh she was around the side of the house at the time.

EDD BILLINGSLEY: Who came to the door on the Sunday night?

ROGER SCOTT THOMAS: Well, it was a woman come to the door at the first but she didn't answer you know, she just.. when she saw me outside she backed up from the door.

EDD BILLINGSLEY: Was there a television on or were they up or were they in bed or do you know?

ROGER SCOTT THOMAS: There was a television on. I don't know whether they were in bed or not except this woman she was at the door. When she backed up she said something to the man that was in the house with her you know and that's when I put the gun through the door and I shot inside and I guess he was standing or had come out of the bedroom at the time see cause the bedroom is really not far from the door.

EDD BILLINGSLEY: Now when you shot you say you put it through the door. Describe that for me, how you did that. Was there a hole in the door or window there or what?

ROGER SCOTT THOMAS: There was a roll in, sort of a roll in type...

EDD BILLINGSLEY: A louver where you can open them up or close, like my hand is straight up and down and then if you open it it comes up kind of like that. Is that the way it was?

ROGER SCOTT THOMAS: That's right sir. So when I shot in there I heard something hit the floor so when I of course looked in I saw the man he had hit the floor from standing side of the door where I had poked the gun through at.

(Whereupon, that portion of the tape, to be played to the jury, was concluded.)

STATE OF ALABAMA,	§	IN THE CIRCUIT COURT OF
Plaintiff,	§	SUMTER COUNTY, ALABAMA
VS.	§	
ROGER SCOTT THOMAS,	§	
Defendant.	§	CASE NO. CC-78-02

ORDER OF THE COURT

After reviewing the evidence from the trial and the sentence hearing, and having weighed the circumstances, whether aggravating or mitigating, the Court fails to find sufficient reason to refuse to accept the death penalty as fixed by the jury. The Court finds that the following aggravating circumstances enumerated in Section 13-11-6 were present in this crime:

1. Capital felony was committed by a person under sentence of imprisonment.

2. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

3. Capital felony was committed while the defendant was engaged in committing a robbery.

4. Capital felony was committed for pecuniary gain.

5. Capital felony was especially heinous, atrocious, and cruel.

APPENDIX C

The Court further finds that none of the mitigating circumstances set out in Title 13-11-7 were present. Therefore, the Court accordingly sentences the Defendant, Roger Scott Thomas, to death by electrocution, and it is the order and judgment of the Court that the Defendant, Roger Scott Thomas be executed as provided by law on the 21st day of July, 1978. It is further ordered that this sentence be suspended pending the automatic appeal required by law. It is further ordered that an appeal to the Court of Criminal Appeals of Alabama be entered as required by law. It is further ordered that the Defendant, Roger Scott Thomas, remain in custody during the pendency of the appeal, and that the Sheriff of Sumter County, Alabama, forthwith transport the defendant to Holman Penitentiary and there deliver him to the custody of the Warden of Holman Penitentiary.

DONE and ORDERED, this the 20th day of June, 1978.

Claud D. Neilson

Claud D. Neilson - Circuit Judge

FILED THIS THE 22 DAY OF June 1978.

Ronald Harrell

Circuit Clerk

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1978-79

2 Div. 238

ROGER SCOTT THOMAS

V.

STATE

APPEAL FROM SUMTER CIRCUIT COURT

ON REHEARING

Defendant's application for rehearing is denied. Footnote one is amended to read: "1. This court specifically rejects aggravating circumstances [sic] four in Appendix C. See Recardo v. Cook [sic], Ala.S.Ct. No. 77-320, 13 ABR 736."

All judges concur.

BOOKOUT, J., concurs specially. BOOKOUT, Judge, concurring specially:

I would not change the opinion as originally written. I concur that Cook, supra, prohibits "pecuniary gain" from being used as an aggravating circumstance where the charge is robbery when the victim is intentionally killed by the defendant. As the Supreme Court said, this in effect condemns the defendant twice for the same act -- stealing money.

The same rationale expressed in Cook, supra, applies to using the circumstance that the "capital felony was committed in the course of a robbery" to aggravate the offense of capital robbery. The two are the same thing, and thus the defendant is being condemned twice for the same act -- robbery.

APPENDIX C

TITLE 13, CODE OF ALABAMA (1975)

CHAPTER II

Death Penalty and Life Imprisonment Without Parole.

§ 13-11-1. LIMITATION ON IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in cases and in the manner herein enumerated and described in 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, §1.)

§ 13-11-2. AGGRAVATED OFFENSES FOR WHICH DEATH PENALTY TO BE IMPOSED; FELONY-MURDER DOCTRINE NOT TO BE USED TO SUPPLY INTENT; DISCHARGE OF DEFENDANT UPON FINDING OF NOT GUILTY; MISTRIALS; REINDICTMENT AFTER MISTRIAL.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years when the child victim is intentionally killed by the defendant;

(9) Wilful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-6-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats

or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, §2.)

§ 13-11-3. HEARINGS AS TO IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE AFTER CONVICTION; ADMISSIBILITY OF EVIDENCE; RIGHT OF STATE AND DEFENDANTS TO PRESENT ARGUMENTS.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a

hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, §3.)

§ 13-11-4. DETERMINATION OF SENTENCE BY COURT; COURT NOT BOUND BY PUNISHMENT FIXED BY JURY.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in Section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence

of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 1

§ 13-11-5. CONVICTION AND SENTENCE OF DEATH SUBJECT TO AUTOMATIC REVIEW.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

§ 13-11-6. AGGRAVATING CIRCUMSTANCES.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious

or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. MITIGATING CIRCUMSTANCES.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. APPOINTMENT OF EXPERIENCED COUNSEL FOR INDIGENT DEFENDANTS.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

§ 13-11-9. EFFECTIVE DATE.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

Supreme Court, U. S.
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DEC 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-5709

ROGER SCOTT THOMAS,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction is reported at 373 So. 2d 1149 (Ala. Cr. App. 1979). The opinion of the Alabama Supreme Court affirming the conviction and sentence is reported at 373 So. 2d 1167 (Ala. 1979).

QUESTIONS PRESENTED

I.

WHETHER THERE IS A CONSTITUTIONAL REQUIREMENT THAT A JURY BE ALLOWED TO CONSIDER LESSER INCLUDED OFFENSES IN A CAPITAL CASE?

II.

WHETHER THERE IS A DUE PROCESS REQUIREMENT THAT A JURY BE INSTRUCTED AS TO LESSER INCLUDED OFFENSES IN A CAPITAL CASE?

III.

WHETHER THE STATE OF ALABAMA HAS A LEGITIMATE STATE INTEREST IN PRECLUDING THE CONSIDERATION OF LESSER INCLUDED OFFENSES BY A JURY IN A CAPITAL CASE?

IV.

WHETHER THE TRIAL COURT MAY CONSTITUTIONALLY REFUSE TO SUSTAIN A CHALLENGE FOR CAUSE WHERE A JUROR, AFTER HAVING A QUESTION EXPLAINED TO HIM, UNEQUIVOCALLY STATES THAT HE CAN RETURN A VERDICT OF "NOT GUILTY" WHERE THERE IS A REASONABLE DOUBT OF THE DEFENDANT'S INTENT?

V.

WHETHER ALABAMA'S DEATH PENALTY STATUTE, WHICH ENUMERATES AGGRAVATING AND MITIGATING CIRCUMSTANCES FOR THE TRIAL JUDGE TO CONSIDER IN FIXING PUNISHMENT, MEETS THE REQUIREMENTS OF DUE PROCESS AND ENSURES INDIVIDUALIZED SENTENCING BASED ON THE CIRCUMSTANCES OF A GIVEN CASE?

VI.

WHETHER THERE WERE SUFFICIENT AGGRAVATING CIRCUMSTANCES IN THE INSTANT CASE TO WARRANT THE IMPOSITION OF THE DEATH PENALTY?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the Alabama Death Penalty Act, which is codified as Code of Alabama 1975, §13-11-1, et seq., and which is set out in full and attached as Appendix C to Petitioner's brief.

STATEMENT OF THE CASE

The Petitioner, Roger Scott Thomas, was indicted by the Grand Jury of Sumter County, Alabama on March 21, 1978, for the murder of one William Beville during the course of the robbery of Mr. Beville's home. Petitioner was tried under Code of Alabama 1975, Section 13-11-1, et seq., which makes the murder of a person during the course of a robbery a capital offense.

On November 20, 1977, Petitioner, who was in jail, informed the jailer that he wanted to talk to an investigator named Billingsley. Billingsley asked Petitioner if he wanted an attorney present, and Petitioner said he did not (R. 167). Billingsley also gave the Petitioner a copy of his Miranda rights and Petitioner read and signed them (R. 165). He stated that he was giving his statement voluntarily and without any force, threat or reward of any kind (R. 172).

On May 15, 1978, the case went to trial. Petitioner was found guilty, the jury fixing his punishment at death by electrocution.

The trial court held a sentencing hearing on June 20, 1978, to determine whether there were sufficient mitigating or aggravating circumstances to warrant upholding the death penalty or commuting the penalty to life imprisonment without parole. At that hearing, the trial judge found none of the mitigating circumstances set forth under the death penalty statute. The trial judge found that the following aggravating circumstances were present:

1. The capital felony was committed by a person under sentence of imprisonment.

2. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

3. The capital felony was committed while the defendant was engaged in committing a robbery.

4. The capital felony was committed for pecuniary gain.

5. The capital felony was especially heinous, atrocious and cruel.

The Court of Criminal Appeals specifically rejected aggravating circumstance number 4, that the capital felony was committed for pecuniary gain, stating that such would be condemning the Petitioner twice for the same offense involving an attempt at pecuniary gain.

Based upon these findings, the trial court sentenced Roger Thomas to death by electrocution (R. 273, 277, 279).

The Alabama Court of Criminal Appeals affirmed the conviction on March 27, 1979. The Petitioner filed an application for rehearing on March 27, 1979, which application was denied. The State of Alabama also filed an application for rehearing, asking the Court to amend the language in footnote 1 of page 19 of the Court's opinion, which rejected aggravating circumstances 3 and 4 which were cited by the trial judge. The State's contention was that only aggravating circumstance 4, and not 3, should be stricken. On May 7, 1979, the Court of Criminal Appeals, ex mero motu, amended its order of April 17, 1979 and corrected the language in footnote 1 as requested by the State, striking only aggravating circumstance no. 4.

Petitioner filed a petition for writ of certiorari with the Alabama Supreme Court, and this petition was granted as a matter of right, as required by Rule 39(c) of the Alabama Rules of Appellate Procedure, on May 8, 1979. On July 6, 1979, the Alabama Supreme Court affirmed Petitioner's conviction and sentence.

SUMMARY OF THE ARGUMENT

The Alabama death penalty statute does not allow the jury to return a verdict for a lesser included offense, and thus avoids the kind of jury discrimination deemed unconstitutional in Furman v. Georgia, 408 U.S. 238, 411. The preclusion of the consideration of lesser included offenses by Alabama's statute does not violate the due process clause. There is no constitutional right to a charge of lesser included offenses. Simply because a procedure has been established for a long period of time does not automatically dictate that there is a due process right to that procedure. It is not necessary to charge a jury on lesser included offenses in order to ensure that the jury be convinced of every element of the crime before they convict a capital defendant. Alabama has other safeguards to ensure that the jury will not convict unless convinced beyond a reasonable doubt. These include the fact that the jury is required to "fix the punishment at death," the fact that the jury has the option of a mistrial, and the fact that the trial judge conducts a sentencing hearing where he may reduce a death sentence to life imprisonment without parole.

The preclusion from consideration by the jury of lesser included offenses does not violate the Equal Protection Clause. The equal protection issue was not presented to the Alabama Court of Criminal Appeals or the Alabama Supreme Court, therefore this Court should refrain from hearing this issue.

There is no fundamental right to a jury instruction on a lesser included offense. The State of Alabama has a legitimate state interest in precluding the consideration of lesser included offenses by a jury in a capital case. This is due to the fact that the history of lesser included

offenses reflects that the consideration of them contributes to jury discrimination and arbitrariness and capriciousness in the imposition of capital punishment.

The trial court may constitutionally refuse to sustain a challenge for cause where a juror, after having a question explained to him, unequivocally states that he can return a verdict of "not guilty" where there is a reasonable doubt of the defendant's intent.

The aggravating circumstances enumerated under Alabama's death penalty statute meet the requirements of due process and ensure individualized sentencing based on the circumstances of a given case. The United States Supreme Court has previously upheld a statute similar to Alabama's, where many of the aggravating circumstances were included as elements of the original capital offense charged. Such a scheme in no way limits individualized consideration of each case, but does ensure reliability in the determination of a particular sentence.

In the instant case, the trial judge found four aggravating circumstances. These aggravating circumstances were sufficient to warrant the imposition of the death penalty.

ARGUMENT

I.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT A JURY BE ALLOWED TO CONSIDER LESSER INCLUDED OFFENSES IN A CAPITAL CASE.

As Petitioner suggests, the Alabama Legislature drafted Alabama's Death Penalty Act, Code of Alabama 1975, §13-11-1, et seq., in order to avoid the pitfalls of jury discrimination prohibited by Furman v. Georgia, 408 U.S. 238 (1972). The most effective way to ensure that the jury was not allowed the unfettered discretion to apply the death penalty in a discriminatory manner was to preclude their consideration of lesser included offenses. The preclusion of lesser included offenses from consideration by the jury avoids the pitfalls denounced in Furman, supra, and thereby promotes sentencing that is consistent with the Constitution.

Alabama's statute provides for judicial sentencing rather than jury sentencing. No capital punishment system which permits a jury to return a conviction on a lesser included offense in a capital case will ever attain the full advantages of judicial sentencing. As long as the jury has the kind of discretion which the availability of lesser included offenses allows them, the inconsistency denounced in Furman will be present and the greater consistency of judicial sentencing and appellate review of sentencing will always be undermined. See, Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion). As stated in Woodson v. North Carolina, 428 U.S. 280, 302 (1976), any capital sentencing scheme in which jurors are tempted by the availability of lesser included offenses merely papers over the problem of de facto jury discretion.

A. THE PRECLUSION OF THE CONSIDERATION OF LESSER INCLUDED OFFENSES BY ALABAMA'S DEATH STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Petitioner contends that the due process requirement that a state may not obtain a conviction until it has proven every element of the offense charged beyond a reasonable doubt is so basic to criminal jurisprudence in the United States that it is common knowledge. We do not argue with this premise. However, nowhere does Petitioner state or cite any authority for the proposition that there is a due process requirement that a jury be charged on lesser included offenses. Indeed, we are not aware of any cases setting such a requirement.

Simply because a procedure has been established for a long period of time does not automatically dictate that there is a due process right to that procedure. Another example of a well-established procedure that is not constitutionally required is the twelve-member jury. In Florida v. Williams, 399 U.S. 78 (1978), this Court held that states were not constitutionally required to use twelve-member juries even though that had been the fixed number of jurors since the middle of the 14th Century, id. at 87 n. 19, 89, even though earlier decisions had assumed that number was constitutionally required, id. at 90-92, and even though the federal courts and virtually all the states used that number. Id. at 103 n. 50; Id. at 136-137 (Harlan, J., concurring).

The history of lesser included offenses reflects that the doctrine developed to assist prosecutors where the evidence failed to establish some element of the offense charged. See, e.g., Keeble v. United States, 412 U.S. 205, 208 (1973); Kelly v. United States, 370 F.2d 227 (D.C. Cir. 1966), cert. denied 388 U.S. 913 (1967); United States v. Markis, 352 F. 2d 860, 866 (2nd Cir. 1965). This doctrine has never been held to be constitutionally required.

It is not necessary to charge a jury on lesser included offenses in order to ensure that the jury be convinced of every element of the crime before they hand down a conviction. Alabama has other safeguards to ensure that the jury will not convict unless convinced beyond a reasonable doubt.

First, if the jury finds that a defendant is guilty of some offense other than the capital offense charged, the jury is not faced with the choice of acquitting a criminal or of returning a verdict sentencing a man to death for a capital offense of which he is not guilty. Instead, the Alabama statutes specifically provide that the jury can refuse to agree on a verdict or on the sentence of death and thereby cause a mistrial. Code of Alabama 1975, §13-11-2(c). This is a very real, very important, option for the juror and safeguard for, the defendant. If a single juror does not agree with the majority, he is not required to vote to convict or acquit. He can simply fail to agree with the majority and cause a mistrial. There have been at least three mistrials to date under the Alabama statute. See, Evans v. Britton, 472 F. Supp. 707, 714-715.

The second safeguard is the requirement found in Code of Alabama 1975, §13-11-2 that before a jury can find any defendant guilty of a capital offense, it must "fix the punishment at death," even though the judge, rather than the jury, is the actual sentencing authority. While the jury is not the sentencing authority, the requirement that any guilty verdict it returns "fix the punishment at death" serves a very important function. Because of the profound difference between death and other punishments, greater reliability is necessary in capital cases. See, Lockett v. Ohio, 98 S. Ct. 2954, 2964 (1978) (plurality opinion). The fact-finding process should not be taken lightly. In a capital case, a procedural device is valuable

if it helps ensure that jurors vote to convict only those defendants of whose guilt the jurors are truly convinced beyond any reasonable doubt and to a moral certainty. The best way to ensure that jurors are aware of their awesome task and its terrible responsibilities is to confront them with it. That is what the statutory provision accomplishes when it requires the jury to phrase a guilty verdict in terms of the punishment at death, even though the jury is not the sentencing authority. Any capital sentencing system in which the jury is tempted to shift its responsibility to the judge runs the risk that guilt adjudication will not be as reliable as possible. Under Alabama's system, the jury has more reason to realize its serious responsibility and to discharge it with care.

The third safeguard contained in Alabama's statute is that the trial judge rather than the jury is the actual sentencing authority. Alabama's Death Penalty Act requires the trial judge to hold a sentencing hearing and carefully weigh the aggravating and mitigating circumstances in each case before deciding whether to sentence the defendant to death or to life imprisonment without parole. Code of Alabama 1975, §13-11-3 and §13-11-4.

Section 13-11-3 provides that the purpose of the sentencing hearing is "to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." The statutory aggravating and mitigating circumstances which the trial court considers at the sentence hearing are set out in §§13-11-6 and 13-11-7. The statute further provides that any evidence which the court deems to have probative value may be received. Section 13-11-3 provides:

> "In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7." [Emphasis added]

As this statutory language itself makes clear, the sentencing authority in Alabama is in no way precluded from considering as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

The Alabama appellate courts have repeatedly held that the statute provides for the consideration of non-statutory mitigating circumstances. Cook v. State, 369 So. 2d 1251, 1256 (Ala. 1979); Jacobs v. State, 361 So. 2d 640, 652-654 (Ala. 1978); see also, Evans v. State, 361 So. 2d 654, 664 (Ala. Cr. App. 1977), aff'd, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979); Neal v. State, 372 So. 2d 1331 (Ala. Cr. App. 1979), cert. denied, 372 So. 2d 1348 (Ala. 1979).

Thus, the sentencing function performed by the trial judge acts as an additional safeguard to ensure that even if there is sufficient evidence to warrant the imposition of the death penalty by the jury, the trial judge may nevertheless reduce the sentence to life imprisonment without parole if he finds that the totality of the circumstances do not warrant a sentence of death.

B. THE PRECLUSION FROM CONSIDERATION BY THE JURY OF LESSER INCLUDED OFFENSES BY ALABAMA'S DEATH STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

At the outset, it should be noted that Petitioner did not raise this equal protection issue in either the Alabama Court of Criminal Appeals or the Alabama Supreme Court. Therefore, neither of the state appellate courts addressed or decided the equal protection issue.

Because the equal protection issue was neither presented to nor decided by the courts below, this Court has no jurisdiction over that issue and should refrain from deciding it. Moore v. Illinois, 408 U.S. 786, 799 (1972); Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see 28 U.S.C., §1257 (2) and (3).

Should this Court nevertheless address the equal protection argument, Petitioner's premise is that only those defendants charged with a capital offense are denied the protection of a lesser included offense instruction and they are thereby denied equal protection. As stated earlier, page 8 , the State of Alabama has a legitimate interest in precluding from consideration by the jury in a capital case lesser included offenses to ensure that the jury does not have the discretion which would result in the sort of discrimination denounced in Furman v. Georgia, supra.

Petitioner maintains that the lesser included offense preclusion should be subjected to strict judicial scrutiny because it infringes upon his constitutional right to unprejudiced jury fact-finding and his right to life.

Strict judicial scrutiny of a classification is appropriate under the Equal Protection Clause when the classification operates to the disadvantage of a suspect

class or infringes upon a fundamental right. E.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973). This Court has never declared capital defendants to be a suspect class for equal protection purposes. Again, the very purpose of the preclusion of lesser included offenses is to guard against unprejudiced jury fact-finding.

The real issue here is whether there is a fundamental right to a jury instruction on lesser included offenses. This Court held in San Antonio School District v. Rodriguez, supra, that the only rights which are "fundamental" for purposes of invoking strict scrutiny are those which are "explicitly or implicitly guaranteed by the Constitution." The availability of lesser included offenses, then, is not a fundamental right because the Constitution neither explicitly nor implicitly guarantees the availability of lesser included offenses.

To the extent that Petitioner's argument is based upon a claim that preclusion of lesser included offenses infringes his fundamental right to reliable fact-finding, then that argument must fail because preclusion under Alabama's statute does not jeopardize the reliability of fact-finding, and therefore capital defendants lose no protection under the statute.

Under traditional equal protection standards, a legislative classification is presumed to be valid if it bears some rational relationship to a legitimate state purpose. San Antonio School District v. Rodriguez, 411 U.S. 1, 40 (1973).

The history of lesser included offenses reflects their potential as a source of de facto sentencing discretion that can lead to some degree of arbitrariness and capriciousness in the administration of capital punishment. See, Woodson v. North Carolina, 428 U.S. 280,

291, 293 & n. 29, 302 (1976) (plurality opinion); id. at 311-313 (Rehnquist, J., dissenting); McGautha v. California, 402 U.S. 183, 199 (1971); Furman v. Georgia, 408 U.S. at 246-247 (1972) (Douglas, J., concurring). The principal reason the mandatory death penalty statute in Woodson v. North Carolina, supra, "simply papered over the problem of unguided and unchecked jury discretion," 428 U.S. at 302-303 (plurality opinion), was that it permitted the jury to convict on lesser included non-capital offenses. All that a North Carolina jury had to do to avoid the imposition of the death penalty under that statute was to return a verdict for second degree murder. The same was true of the Louisiana statute struck down in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), where the plurality reasoned that the availability of lesser included offenses "plainly invite[d] the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel that the death penalty is inappropriate," thereby interjecting an element of capriciousness. 428 U.S. at 334-335 (plurality opinion). The prediction upon which Roberts is bottomed is that at least some Louisiana juries would convict of only a lesser included offense even though all the jurors were convinced that the greater capital offense had been proven. Woodson v. North Carolina, 428 U.S. at 314 (Rehnquist, J., dissenting).

As discussed in the preceding sections on due process, there are a number of safeguards built into the Alabama statute to ensure that the death penalty is imposed in a consistent, rational and undiscriminatory manner. These include the fact that the jury is required to "fix the punishment at death," the fact that the jury has the option of a mistrial, and the fact that the trial judge conducts a sentencing hearing where he may reduce a death sentence to life imprisonment without parole.

Petitioner cites a 96% conviction rate for capital offenses in Alabama where the defendant pled not guilty and an 86% conviction rate where the jury found the defendant guilty and punishment was contested (p. 8). He maintains that these statistics demonstrate that the statute is operating in an unconstitutional manner. Petitioner's argument overlooks the fact that the offenses made punishable by death under Alabama's statute are very narrowly drawn to include only the most dangerous and serious crimes. The conviction rate is as high as it is because only the most serious and most well-prepared cases are brought under the death statute. More time and effort is expended because of seriousness of the offense and the nature of the crime. If overwhelming evidence was not gathered in support of aggravated murder, the prosecution would use the regular homicide statute, where lesser included offenses would be available.

As Justice Jones of the Alabama Supreme Court notes in his dissenting opinion (amended version) in Clyde Cade v. State, No. 78-288 (May 25, 1979), of the 65 death penalty convictions returned as of the date of his opinion, 22 of those defendants were sentenced to life imprisonment without parole. Of the 22 cases in which a defendant was sentenced to life without parole, 13 were the result of a negotiated guilty plea and agreement at trial. In the remaining 9 cases, the defendant was convicted at trial on a plea of not guilty and was then sentenced by the judge to life without parole. These statistics prove that Alabama's act is not mandatory and that, even though a defendant is convicted under the act, he may receive a sentence of life imprisonment without parole.

In summary, the inclusion of lesser included offenses in a capital sentencing system is not constitutionally required. Preclusion of lesser included offenses serves important constitutional goals, and there is no evidence

whatsoever that it will result in the conviction of a defendant who is not guilty of a capital offense. In any event, the Alabama statutory system contains important safeguards to ensure that the death penalty is not imposed in an arbitrary or discriminatory manner.

II. THE TRIAL COURT MAY CONSTITUTIONALLY REFUSE TO SUSTAIN A CHALLENGE FOR CAUSE WHERE A JUROR, AFTER HAVING A QUESTION EXPLAINED TO HIM, UNEQUIVOCALLY STATES THAT HE CAN RETURN A VERDICT OF "NOT GUILTY" WHERE THERE IS A REASONABLE DOUBT OF THE DEFENDANT'S INTENT.

Although petitioner makes no argument in his petition regarding the refusal of the trial court to sustain a challenge for cause of one of the venireman at his trial, he does list this point as one of his "questions presented." Respondent will therefore briefly address that point.

Petitioner's question specifically is, "May the trial court constitutionally refuse to sustain a challenge for cause to a venireman who answers that he would find the accused guilty of capital murder even if he believed that he had not intentionally killed the victim?"

This question is misleading.

Juror Smith intially answered that he believed he would probably find the defendant guilty in response to the question propounded by defense counsel, "Is there anyone here, although you might believe he robbed him and he did kill him, but you had a question about the intent, is there anyone here who would find him guilty anyway?" (R. 44)

However, the trial court then questioned Juror Smith further, to clarify his feeling on the issue of intent. It is clear from the exchange that Juror Smith was initially confused by the question, but concluded with the finding that he could render a verdict of "not guilty" if there was a reasonable doubt as to whether the killing was intentional. Part of the exchange with Smith follows:

> "MR. WATKINS: Let me ask him one or two questions, Judge, since there is a challenge for cause. Now, Mr. Smith, would you be able to take an oath as a juror and listen to the evidence that

comes from the witness stand and be influenced only by that evidence that comes from that witness stand as to whether or not this man is guilty; assuming that he's innocent until the case starts; could you do that?

"MR. SMITH: Listen to the evidence?

"MR. WATKINS: Yes.

"MR. SMITH: Yes.

"MR. WATKINS: All right. Now, in doing that, would you require a reasonable doubt and if you find a reasonable doubt as to intent, would you be able to find him not guilty if the Judge instructed you that was the law?

"MR. SMITH: ...the question is not whether a person was killed or not?

"MR. WATKINS: That's not the question. No, sir.

"MR. SMITH: The question is the intent.

"MR. WATKINS: That is one of the requirements and one of the essential elements in this case. Would you require the State of Alabama to prove to you beyond a reasonable doubt that this man intentionally killed the deceased? Would you make that requirement, which the Judge is going to tell you is the law?

"MR. SMITH: Yes.

"MR. WATKINS: Then, if you're not convinced beyond a reasonable doubt that he intended to kill the deceased, then you would be able to find him not guilty, would you not?

"MR. SMITH: Right. If clear cut.

"MR. WATKINS: All right. I would oppose the challenge for cause.

"MR. BOGGS: I still challenge for cause.

"THE COURT: Before I rule I want to ask you one more time, Mr. Smith. If the evidence were such that there was a reasonable doubt in your mind as to the innocence or guilt of the defendant, would you be able to return a verdict acquitting the defendant; that is, turning the defendant aloose, returning a verdict of innocence, if there was a reasonable doubt in your mind as to whether it was an intentional killing or not? If there was a reasonable doubt in your mind, would you be able to return a verdict finding the defendant not guilty?

"MR. SMITH: Yes, if it was a reasonable doubt; a clear reasonable doubt.

"MR. WATKINS: Semantics, Judge, reasonable doubt.

"MR. BOGGS: I know and such semantics, I think he ought to be challenged for cause for justice to be done, Your Honor.

"THE COURT: Based on Mr. Smith's answer that if there were a reasonable doubt in his mind that he would acquit the defendant, I'm not going to grant a challenge for cause in that particular case.

"MR. BOGGS: We except, Your Honor. Is there anyone on this jury panel that if you were the only one; if you were the only one, Mr. Smith, everybody else wanted to electrocute Roger Scott Thomas, you said, well, based on the evidence I'm not sure that he intentionally killed him. I believe that he killed him, but I don't believe that he intentionally did it, so I'm not going to vote to electrocute him; would you stay there for two days if necessary or would you go ahead and vote guilty, if you believed he shot him?

"MR. SMITH: I would follow my own.

"MR. BOGGS: What would that be?

"MR. SMITH: If the evidence showed that he didn't intentionally kill him, it would be not guilty.

"MR. BOGGS: All right. You're convinced of that?

"MR. SMITH: Yes, sir.

"MR. BOGGS: Does everyone else feel the same way?

"THE COURT: Let the record show that that last statement was made by Mr. Smith." (R. 43-46) [Emphasis added]

Once Juror Smith understood that under the law intent must be proved beyond a reasonable doubt in order to convict a person under the death statute, he unequivocally stated that if there was a reasonable doubt as to intent, he could render a verdict of not guilty. At that point, there was no error in denying the challenge for cause.

The Court of Appeals, in holding that the trial court correctly overruled appellant's challenge for cause of juror Smith, cited the United States Supreme Court cases

of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776; and Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 339, 50 L. Ed. 2d 339. In those cases, the U. S. Supreme Court determined that it was error to grant a challenge for cause where the juror stated a general objection to the death penalty. The Court held that the bias must be unequivocally stated; that the juror must specifically state that he would not, under any circumstances, impose a penalty of death before a challenge for cause could properly be granted. Certainly there was no unequivocal statement of bias in the instant case, therefore, the challenge for cause was properly denied.

III.

ALABAMA'S DEATH PENALTY STATUTE, WHICH ENUMERATES AGGRAVATING AND MITIGATING CIRCUMSTANCES FOR THE TRIAL JUDGE TO WEIGH AND CONSIDER IN FIXING PUNISHMENT, COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS AND ENSURES INDIVIDUALIZED SENTENCING BASED ON THE PARTICULAR CIRCUMSTANCES OF A GIVEN OFFENSE.

Petitioner asserts that Alabama's death penalty act is constitutionally deficient because many of the aggravating circumstances enumerated are also elements of the capital offense charged. He cites "common sense" in support of his theory that the same fact should not be used in defining an offense and in finding aggravation of that offense.

This argument overlooks that fact that Alabama's statute was carefully drafted to provide very narrowly defined capital crimes in order to limit the application of the capital murder statute to the most serious of crimes. These narrow definitions of capital offenses are important in promoting the kind of sentencing that Furman v. Georgia, 408 U.S. 238 (1972) requires. In Lockett v. Ohio, 438 U.S. 586, 601 (1978), the Supreme Court explained that Furman, supra, requires that sentencing discretion be "directed and limited" so that the death penalty will be imposed in a more "consistent and rational manner" and so that there will be a meaningful basis for distinguishing between the cases in which it is imposed from the cases in which it is not imposed. Common sense tells us that where the offense itself is so narrowly defined, it follows that some of the factors constituting aggravating circumstances would necessarily be similar or idential to elements of the offense.

This Court has recognized the validity of this kind of statute in upholding Florida's death statute in Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating and mitigating circumstances set out in Florida's death statute are very nearly identical to Alabama's, the only difference being that under Alabama's statute, aggravating circumstance number 4 deletes several of the crimes listed in Florida's statute—arson, aircraft piracy, and the unlawful throwing, placing or discharging of a destructive device or bomb. In upholding the Florida statute in Proffitt, supra, this Court stated:

> "The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." at 49 L. Ed. 2d 926.

The Court further stated that the Florida capital sentencing procedures seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Id. at 923.

Of course, under Florida's statute as well as Alabama's, many of the aggravating circumstances overlap with elements of the capital offense. See, e.g., State v. Dixon, Fla., 283 So. 2d 1 (1973), where the Florida Supreme Court upheld the constitutionality of Florida's death statute, specifically approving the aggravating and mitigating circumstances, stating:

> "The most important safeguard presented in Fla. Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed. It is argued that the circumstances are vaguely worded in some cases, and that they do not provide meaningful restraints and guidelines for the discretion of judge and jury. We disagree.

> "The aggravating circumstances of Fla. Stat. §921.141(6), F.S.A., actually define those crimes—when read in conjunction with Fla. Stat. §§782.04(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge of jury."

Such a scheme in no way limits individualized consideration of each case, but rather it does ensure reliability in the determination of each particular sentence. For example, suppose there are two defendants who were involved in the same robbery/murder. One of the defendants is seventeen years old, has no prior record, and is not the person who actually committed the murder. The other defendant is 28 years old, has a prior conviction for another felony involving the use of violence, and is the person who pulled the trigger. The first defendant has three mitigating circumstances in his favor and the one aggravating circumstance that the felony was committed while he was engaged as an accomplice in the commission of a robbery. The second defendant has at least four aggravating circumstances against him, one of which is that the felony was committed while he was engaged in the commission of a robbery, and no mitigating circumstances.

It is entirely probable, under such circumstances, that the first defendant would receive a sentence of life imprisonment, while the second defendant would receive a sentence of death. Thus, even though aggravating circumstances which are also elements of the crime are used in the sentencing process, the variety of aggravating/mitigating circumstances involved allows individualized consideration, even to the extent that different results may be reached where two defendants are involved in the same crime.

A. THERE WERE SUFFICIENT AGGRAVATING CIRCUMSTANCES IN THE INSTANT CASE TO WARRANT THE IMPOSITION OF THE DEATH PENALTY.

In the instant case there were two aggravating circumstances found by the trial judge which were not elements of the offense and which, in fact, had nothing to do with the offense for which Thomas was convicted.

These aggravating circumstances were:

(1) that the capital felony was committed by a person under sentence of imprisonment; and

(2) that the defendant was previously convicted of another felony involving the use or threat of violence to the person.

The evidence at trial and at the sentencing hearing reflected that Thomas had two prior convictions for robbery in Alabama and a conviction for second degree murder in Florida. He also had served an earlier sentence in Mississippi.

Petitioner argues that if the Court accepts his contention that robbery cannot be both a definitional element of the crime and an aggravation of the crime then his sentence of death would be based solely on the fact that he was already under a sentence for a violent crime, which he suggests would be an insufficient ground. We certainly do not agree with petitioner's contention that an aggravating circumstance cannot also be an element of the crime. However, even if the aggravating circumstance that the murder was committed during the course of a robbery was not present, the other grounds set out by the trial judge provide ample basis for the imposition of the death penalty. Surely the fact that Thomas had two prior convictions for robbery and one for second degree murder is such strong evidence in aggravation that the trial judge would have been warranted in imposing the death

penalty on those grounds alone. Of course, the statute only requires that the trial judge find one aggravating circumstance in order to fix the punishment at death. Code of Alabama 1975, §13-11-4. Here, the trial judge found four valid aggravating circumstances.

No court has ever held that the sentencing authority must apply a particular standard of persuasion to the sentence decision itself. The Fifth Circuit did not so hold in Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978). The United States Supreme Court has never so held. The statutes it upheld in Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, supra, did not so provide.

If it is ever held that the sentencing decision itself must be made in light of some particular standard of persuasion applied in the sentencing authority's mind, then Alabama's death penalty statute can be so interpreted. See, e.g., Universal Amusement Co. v. Vance, 587 F. 2d 159, 166 (5th Cir. 1978) (en banc); Pugh v. Rainwater, 572 F. 2d 1053 (5th Cir. 1978) (en banc). For now, it should suffice that under any conceivable standard Petitioner was deserving of the death penalty, and no reasonable unbiased person could conceivably have decided the matter differently than the trial court judge in Petitioner's case.

CONCLUSION

Based on the foregoing argument, Respondent submits that the Petition for Certiorari is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of December, 1979, I did serve a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for the Petitioner, by mailing a copy of the same to him, postage prepaid and properly addressed as follows:

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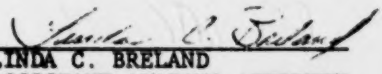

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